IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
MISC.794 OF 2002

REPUBLIC ……..……..APPLICANT

V E R S U S

THE MINISTER FOR LOCAL GOVERNMENT ……..……..RESPONDENT

AND

DAVID NGUGI NJEHIA ……..…1ST INTERESTED PARTY

J. W. KANGETHE TOWN CLERK

OF THE MUNICIPAL COUNCIL OF THIKA ……2ND INTERESTED PARTY

1. COUNCILLOR MUMBI NG`ARU…….)

2. COUNCILLOR S. G. NJUGUNA ……..…)

3. COUNCILLOR ALI MOHAMOUD ……...)

4. COUNCILLOR PATRICK MIDEGA …….)

5. COUNCILLOR ROBINSON NDEGWA…….)

6. COUNCILLOR CHARLES CHEGE ……..)

7. COUNCILLOR JAMES GIKAR….)APPLICANTS

8. COUNCILLOR PHILIP MIONKI ……...)

9. COUNCILLOR ELIZABETH M. H…….)

10.MUNICIPAL COUNCIL OF THIKA..….)

R U L I N G

This is a Judicial Review application under order 53 of the Civil Procedure Rules brought by way of Notice of Motion dated 5th August 2002 asking that this court by order of certiorari and prohibition removes the decision of the minister for Local Government dated 14/6/2002 contained in the said Minister`s letter of June 14th 2002 addressed to the 1st interested party (hereinafter called the former

mayor) relieving from personal responsibility and or liability in respect of the surcharge upon him the former Mayor for the improper expenditure of the funds belonging to the Municipal Council of Thika, the 9th applicant, totaling KShs.1,239,671/= which surcharge was effected on 1st September 2000 pursuant to the provisions of Section 236 (1) of the Local Government Act Cap.265 of the Laws of Kenya. The main prayers in the application are two and they are formulated in these terms:-

(a) An order of CERTIORARI to remove into the High Court and quash. The letter of the Minister for Local Government dated 14th June 2002 addressed to the 1st interested party in purporting to quash or vary the decision of the Local Government Inspectors appointed under Section 231 of the Local Government Act Cap.265 to surcharge improper expenditure upon the interested party.

(b) An Order of Prohibition do issue to prohibit the respondent in discharge of his Ministerial duties/functions, from abusing his powers under Section 238 (1) of Cap 265 by exceeding his statutory powers and or acting in disregard of the provisions of the said act in purporting to quash or vary the decision of the Local Government Inspectors to surcharge improper expenditure of funds belonging to the Municipal Council of Thika upon the 1st interested party.

The history of the matter is that 1st party was at one time a Mayor of Thika Municipality. The councilors complained against his management practices and charged him with various misdemeanors, and as differences widened between the former Mayor and his councilors and failing to have the same resolved, team of 2 inspectors from the Ministry was sent to the Municipality to verify these allegations after a meeting of Senior Officers with the Local Government Minister on 2nd May 2000. Allegations against the former Mayor included:- failure to account for or surrender imprest in the amount of KSh.363,000 authorising direct banking of monies into council`s bank account without councils resolution.

Committing Council on rehabilitation on pond treatment by Castle Brewers without council resolution. Failure to pay compensation for Motor vehicle KAB 037Q through his company called Bimasure Insurance Brokers, starting flower project without council`s resolution, and misuse of office.

The duo investigated the allegations and made written and considered recommendations which included inter alia that:-

"HIS WORSHIP THE MAYOR SH OULD BE SURCHARGED FOR ALL T HE EVILS HE HAS committed TO THE COUNCIL"

The former mayor tried through several legal moves to get a court order or order to extricate himself from the harsh indictment of the verification inspectors and while these had been set in place and the cases proceeded he made a move that rendered the legal suits superfluous and that is when he wrote a letter dated 13th June 2002 to the minister, but before then he was served with certificate of surcharge dated 1st September 2000 from local government inspectors saying :-

Ministry of Local Government

P. O. Box 3004

NAIROBI

Date: 1 st September 2000

CERIFICATE OF SURCHARGE

We, P. M. Karanja and P.M. Malombe do hereby state as follows: -

1. We are Local Government Financial Officers appointed by the Minister for Local Government under the provisions of Section 231(1) of the Local Government, Act (Cap.265) to inspect and examine the accounts and records of Local Authorities.

2. Under examination and inspection of the records of the Municipal Council of Thika, we under section 236(1) (a) of the said Act, disallow as contrary to law the sum of KShs.357.638.00 (Kenya shillings three hundred fifty seven thousand six hundred and thirty eight only) in respect of outstanding imprests.

3. By virtue of Section 236(1) (b) of the said Act it is our duty to s urcharge the said amount of KSh.357,638.00 upon the person or persons responsible for incurring or authorising the expenditure thereof.

4. We hold David Ngugi Njehia to be the person responsible for incurring the said expenditure of KShs.357,638.00 and do sur charge the said amount of KShs.357,638.00 upon the said David Ngugi Njehia.

***WE DO HEREBY FURTHER CERTIFY** that by reason of the surcharge herein before effected that the said sum of Kshs. 357,638.00 is due from the said David Ngugi Njehia.*

Dated at Nairobi this 1 st day of September 2000.

P. N. KARANJA ***P. M. MALOMBE***

Financial Officer ***Financial Officer***

Ministry of Local ***Ministry of Local***

Government ***Government***

Ministry of Local Government

P. O. Box 30004

NAIROBI

Councillor David Ngugi Njehia

Thika Munic ipal Council

P. O. Box 240

THIKA

<u>CERTIFICATE OF SURCHARGE</u>

Enclosed herewith is a certificate of surcharge in respect of the sum of KShs.357,638.00 showing that sum as due from you.

1. Your attention is also drawn to section 238 and 239 which deal with your r ights of appeal and application for relief.

2. Your attention is also drawn to section 240 (1) of the Local Government Act (Cap.265) which requires every sum certified by an Inspector to be due from a person shall be paid by the person to the Local Authority within 14 days of the appeal or application being finalized.

3. In accordance with Section 240(2) it is my duty to take all necessary steps to recover from the person surcharged in any competent court any sum certified as due which is not paid as required.

4. You are asked to acknowledge receipt and indicate your intentions in the matter.

SIGNED

P. M. KARANJA ***P.M. MALOMBA***

FINANCIAL OFFICER ***FINANCIAL OFFICER***

MINISTRY OF LOCAL ***MINISTRY OF LOCAL***

GOVERNMENT ***GOVERNMENT***

As a reaction to this surcharge, the former Mayor wrote to the Minister for Local Government on 13th June 2002 a letter headed Re: APPLICATION FOR RELIEF (the letter reads:)

"This is in reference to a report by Local Government Officers Mr. P. M. Karanja and Mr. P. M. Malombe of 2000 on Municipal Council of Thika. The basis of that report was on the one part expenditure on diverse days related to the office of his Worship the Mayor of Thika and on the other on Insurance Premium over Insurance business transacted between the council and M/S Bimasure Insurance Brokers Ltd allegedly related to any person.

Over the expenses related to the office of the Mayor these were duly institutionalized through the Council`s budgetary process in each case facilitated by the Town Clerk and the Treasurer to the Council and subsequently utilized for the benefit of the Council.

On the insurance premium this related to commercial transactions between counseling legal entities as per the provisions of the Companies Act Cap.485 of Laws of Kenya and never involved me as a person.

It is Sir on the basis of the foregoing that I wish to seek relief as provided for under the provisions of the Local Authorities Act Cap 265 Laws of Kenya on areas when the report to relies on my person.

Yours faithfully

COUNCILLOR DAVID N. NGUGI

The Minister of Local Government replied expeditiously by a letter dated 14th June 2001. The letter addressed to the former Mayor said:-

"APPLICATION FOR RELIEF FROM PERSONAL LIABILITY:

Reference is made to your application dated 13th June 2002 for relief from personal liability in respect of the surcharge.

Having examined the matter of surcharge I am satisfied that you acted reasonably and that the said action was authorized by the law and therefore you stand relieved wholly from personal

responsibility in respect of the surcharge .

HON. UHURU KENYATTA EGH MBS MINISTER FOR LOCAL GOVERNMENT.

The applicants who are Councilors of Thika Municipal Council and the council itself now apply to have this letter by the Minister quashed by application of Prerogative Order of Certiorari. Their reasons are:- that the Minister`s decision is made in bad faith, was in breach of Section 239, and that the decision was not in the interest of the Municipal Council of Thika. That the Minister replied too soon by giving his pardon the day next after the application Indicating of a rush decision without consultations and proper consideration.

Mr. G. B. M. Kariuki submitted very meticulously saying that the Minister`s letter and decision were ULTRA VIRES Section 239 of the Local Government Act Cap.265. That the former Mayor applied for pardon after failing to get relief from cases already in court but that the Minister made decision when there was no application before him for a declaration as is required by Section 239(1) of Cap.265 paragraphs. Mr. Kariuki abandoned paragraphs 3(a) and (f) of the statement so I have not considered them. Mr. Kariuki argue that the Minister did what he was not asked since the letter never asked him to make a declaration. The letter merely asked him to execuse the former Mayor.

The Respondent and the former Mayor through the affidavits and submissions by their learned counsel Mr. Sitima, Senior State Counsel, Mr. Kimani and Mr. Mwangi for respondent, former Mayor and second interested party consecutively opposed this application saying that as there is no statutory format on which the Minister would wake his declaration. What the Minister wrote was adequate under S.239 aforesaid and, that the Minister must have considered the matter as this was expressed in the letter, that the applicants have no locus standi being Councillors suing without a Resolution of the Council, that the Minister's action was ultra vires S.239 and that a day`s reply was a show of expediency and that the Minister applicant has not shown how the action was ultra vires. That S.239(2) wakes the Minister's decision final and he acted in good faith. That a council can only be sued and also sue in its own name so suing on behalf of the Thika Municipality when Thika Municipality can sue on its own was preposterous and that the councilors were overreaching themselves and in fact the Town Clerk could do the job.

Ref. S.86A of Cap 265. That the said Councillors usurped power of the Town Clerk besides and finally that it has not been shown that the Minister acted ultra vires.

This application was argued very keenly by the Counsel that appeared before me and several authorities were considered and I am obliged to them for their industry.

In considering this application one must discuss the operation of S.239 of the Local Government Act Cap 265 which says:- 239(1) In the case of surcharge the person surcharged may whether or not he appear under S.238 apply to the court or the Minister of whom he appeals of if he does not appeal to the Minister, for a declaration that in relation to the subject matter of the surcharge he acted reasonably or in the belief that his action was authorized by law, and the court or Minister, if satisfied that there is proper ground for doing so, may make a declaration to that effect.

(2) Where such a declaration is madder the person surcharged, if by reason of the surcharge he is subject to the disqualification imposed by paragraph 3 © of the Fifth Schedule, shall not be subject to that disqualification, and the Court of Minister may, if satisfied that the person surcharged ought fairly personal liability in respect of the surcharge, and the decision of the Court or Minister under this section shall-be final.

The question is whether the Minister's letter and pardon were ultra vires the section. The understanding of the principle of ultra vires simply is that a local authority entrusted with certain statutory powers or a minister or anyone else should exercise those conferred powers within the confines of the creating statute and not to create their own extended power and the courts duty is merely to check to adjudicate on the exact limits of that particular allocation of power. This follows a time honoured

proposition that such power is conferred on the local authority or Minister or whoever makes a decision in question "on the underlying assumption that the powers are to be exercised only within the jurisdiction confrered in accordance with the provided procedure and to be acted on reasonably within the Wednesbury Principle.

A decision maker acts ultra vires if he exercises his powers outside the jurisdiction conferring or in a manner procedurally irregular or unreasonable see L.J. BROWNWILKINSON in HOLL UNIVERSITY VISITOR EXP. PAGE 1993.

Even local authorities are subject to ultra virus Rule but there is significant stress on transgressions of local authorities in that "courts will intervene only where a local authority has exceeded its express or implied statutory powers see WEMLOCK (BARONESS) Vs RIVER DEE CO. (1885)10 AC 354 per Lord Warson this is because became normally many statutes are phrased in the most general terms and judicial review is frequently concerned more with implied authority and potential abuse of discretion than with express transgression.

Powers exercised by Ministers are similarly held to be ultra vires although may not be interpreted in the very manner like a Local Authority.

See Prof. Gordon on **Judicial Review. T**he implications that there will always be inference that the authority has power to do whatever is reasonably incidental to performance of acts that are clearly authorized.

Looking at the letter from the former mayor it is clear to me that he is saying that he acted reasonably as the money he is accused of misused seemed to have been spent on the affairs of the council. Then where did the Minister wrong? This has not been shown in evidence. It was said in argument by Learned Counsel for the applicant that he took into consideration irrelevant matters without showing which matter it was. It was said he had nothing to consider as he did not look at the report as the decision was hurried and lacked consideration but against this it was not although it ought to have been acknowledged that the report originated from the Minister's office and that P.M. Karanja and P.M. Malombe said they were Local Government and therefore must have acted on behalf of the Minister and with his knowledge. Financial Officers who could have discussed their certificate of surcharge with the Minister. The certificate was dated 1.9.2000. The Minister had opportunity to consider that report.

There was no other statutory requirement against which the Minister should be satisfied. The Act leaves the Minister with a wide discretion which the court should not be seen to fetter easily. The Minister on being satisfied is to make a declaration. That to me that he has to declare, to make his decision known clearly. Collins Concise English Dictionary describes ***"declaration "*** as **"an explicit emphatic statement " a** formal statement or announcement. The ruling of a Judge or court on a question of law.

Blacks Law Dictionary decribes To Declare as:-

> **To make known, to signify to show in any names either by words or acts to publish to utter, to announce clearly some opinion of resolution - - - - - -"**

I think the Ministers letter was an announcement of his decision an explicit and emphatic statement like the ruling of a Judge and as there was no prescribed form I do not see how it can be as sailed for informality.

If allegation that the order was unreasonable is to succeed here then the applicant must show on a balance of probability that the decision was so unreasonable that no reasonable authority could have made in the principle of Wednesbury's case. Secondly it was alleged that there was bad faith again it is the law that applicant ought to show that there has been some dishonest misuse of power See CANNOCK CHASE D.C. Vs KELLY (1978) IWLRI or reliance on malice or personal interest. There ought to be evidence that the Minister acted under such motives which distorted his decision or biased his approach to the subject of the decision making the decision be taken in bad faith.

In GRICE VS DUDLEY CORPORATION [1958]CH.329 it was held there that a court will not in general entertain allegations of bad faith made against the repository of a power unless bad faith has been properly pleaded and particularized.

This approach was not carried out by the applicant here and as concerns the expedition within which this was done, I think I agree with Mr. Kimani that this was a credit to the Minister as it was a show of efficiency. He perhaps burnt his midnight candle.

The prayer here is for Certiorari and Prohibition the former lies to quash a decision made by a statutory body where that body has abused its jurisdiction or acted utlra vires the statute or misused his discretion or violated a rule of Natural Justice, whereas the latter is an order issued by the High Court to prevent the Respondent from acting or continuing to act in a manner that is an abuse of jurisdiction or a failure to observe the principles of natural justice, but where the act complained of is already done it is not applicable unless there is something left to act upon. In this case as far as the Ministers act had been exercised I do not see that there was anything more remaining to be done. He had already given his pardon. There was nothing else for him to do.

However, as concerns locus standi which parties strongly argued the requirement is now similar to both Certiorari and Prohibition and I must say locus standi is now uniform in all the three branches of the orders. To obtain these orders the applicant must possess sufficient interest or must be a person aggrieved unless one is a mere busy body taking curious interest in matters that do not affect him but generally for certiorari locus is regarded generously and in a more wider context.

Normally the issue of locus standi is considered at the leave stage but is also considered at the application stage, so although I earlier gave leave here it can still be revisited However, the argument that Councillors of the Municipal Council could only institute suits with approval of the Council by a Resolution to me cannot be maintainable because any rate payer can complain to court against the actions of a local authority so is RESIDENCE in the area which may also suffice.

A person aggrieved has been described as:-

"One who has a genuine grievance because an order has been made whic h prejudicially affects his interest" per Privy Council in ATTORNEY GENERAL OF GAMBIA VS NJIE 1961 AC 617

I also follow Court of Appeal (Kenya)'s reasoning in Njau & 5 Others Vs Nairobi City Council [1982-88]1 KAR 229.

I agree with Mr. GBM Kariuki that the restrictions of the council here can apply perhaps in a case instituted by plaint or other way other than under O.53 for Certiorari in Judicial Review.

Mr. Mwangi argued that a local authority cannot complain against the decision of the Minister and be so aggrieved to be a party to a Judicial Review application. My answer to this is to quote the Court of Appeal Case in English Case of COOK VS SOUTH END Be [1990] 2QB) where the court having examined many past decisions rejected the view that a local authority was NOT a person aggrieved and that a Local Authority could apply for prerogative orders like anybody else. The court said:-

> ***"Except for criminal cases which come within a special category - - - the normal result should be that a public authority w hich has an adverse decision made against it in an area where it is required to perform public duties it is entitled to be treated as a person aggrieved" - - besides even where a local authority has a decision in Land that favours it it can still apply if that decision is based on reasons that create undesirable precedent".***

So Thika Municipal Council on this authority was in order in applying for Judicial Review. Mr. Kariuki complains that the decision is unfair as it would mean that the council would lose funds that the former Mayor would have paid back in to public kitty.

But this is near to asking the court to substitute its own decision for that of the Minister. That is beyond the scope of Judicial Review which should be to avoid the above substitution exercise but only on to make the decision maker rehear the matter according to law by correcting the manner in which a decision was arrived at and not the merits of that decision I have looked at S.239(1) and (2) of cap 265 and seen the letter the Minister wrote I find it intelligible and in the absence of any standard form there is no basis for challenging It for lack of format.

I have considered the arguments here and to answer the question whether certiorari should issue, it is my considered view that the breaches complained of are not sufficient to make this court use its discretion to order certiorari.

With regard to Prohibition I think the exercise to be stayed had already taken place and there is nothing to be prohibited.

The Minister already had given the pardon complained of and therefore the order cannot issue. For these reasons I respectfully disallow the application and dismiss it with costs.

All previous orders are hereby discharged.

Delivered this 25th day of November 2002.

A.I. HAYANGA

JUDGE

25/11/2002