



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA KIAMBU
JUDICIAL REVIEW NO. 7 OF 2018

REPUBLIC..... APPLICANT
AND
ESTHER WAMBUI KINYANJUI.....1ST RESPONDENT
DEPUTY COUNTY COMMISSIONER KIAMBU
COUNTY.....2ND RESPONDENT
COUNTY COMMISSIONER KIAMBU COUNTY.....3RD RESPONDENT
THE CS MINISTRY OF INTERIOR AND
CO-ORDINATION OF NATIONAL GOVERNMENT.....4TH RESPONDENT
THE HON. ATTORNEY GENERAL..... 5TH RESPONDENT
AND
PATRICK NGUGI MUKIRI.....1ST INTERESTED PARTY
PATRICK NJOROGE MBURU.....2ND INTERESTED PARTY
AND
MOSES NDUNGU MWAURA..... *EX PARTE* APPLICANT
J U D G M E N T

1. Before the Court is a Chamber Summons filed on 5/03/2018. The Applicant (“Applicant”) **Moses Ndungu Mwaura** seeks the following orders:

“a. An order of Certiorari to remove into this Honourable Court and quash the decision of the 2nd Respondent appointing the 1st Respondent as the Chief of Kamiti Location within Tinganga Division, Kiambu Sub County, Kiambu County.

b. An order of Prohibition directed towards the Respondents from continuing with the process of settling down the 2nd Respondent into the new office.

c. An order of Mandamus to compel the 2nd, 3rd and 4th Respondents to release the results of the interview held for the post of the Chief of Kamiti Location as well as all reports and reasons that informed their decision in the appointment of the 1st Respondent.

d. An order of Mandamus to compel the 2nd, 3rd and 4th Respondents to appoint the best interviewee as the Chief of Kamiti Location other than the 1st Respondent, or in the alternative to undertake the process anew.

e. A declaration that the ex-parte applicant’s rights to fair administrative action as enshrined under Article 47 of the Constitution, was violated by the Respondents.

2. The Application is premised on among others the ground that the 2nd, 3rd and 4th Respondents in appointing the 1st Respondent as the Chief of Kamiti Location failed to comply with the material requirements and conditions precedent.

3. In his verifying affidavit the Applicant deposed that on 21st August, 2017 the 4th Respondent advertised a vacancy in the post of Chief Kamiti Location, following the demise of the former Chief Simon Ndichu. That the Applicant applied for the said position and was invited for the interview. That the 1st Respondent was appointed despite suspicion and complaints that she was not from the local area. He further deposed that the decision to appoint the 1st Respondent is flawed and against his legitimate expectation as a resident of Kamiti Location.

4. **Esther Wambui Kinyanjui** the 1st Respondent filed her replying affidavit on 17th April, 2018. Therein she stated that she is a resident of Kamiti location where she has built her matrimonial home and as such the Applicant's allegations are false. She deposed that she was well versed with the location and has the support of locals who had signed a petition in support of her appointment. She asserted that the recruitment process was conducted fairly, availing an opportunity to all applicants to appear for the interview and that the select committee did adhere with all the requirements and that she met the expectations of the interview panel. Thus, the applicant's application was frivolous and vexatious and the same should be dismissed.

5. The Attorney General, (5th Respondent) filed his grounds of opposition on 19th March, 2018. To the effect that the application is frivolous and is based on apprehension. The application was said to be an abuse of the principles of judicial review thus the orders sought should not be granted.

6. Further, **Kiarie Njuguna** the 2nd Respondent herein swore his replying affidavit filed on 6th June, 2018. Asserting therein that upon demise of the erstwhile chief, there arose a vacancy in the position of a Chief- Kamiti Location. That he advertised the said vacant position and subsequent shortlisting of the applicants was done in accordance with the prescribed criteria. He deposed that a confidential background check report on the shortlisted candidates was conducted and interviews later conducted. And that he subsequently wrote to the successful candidate who accepted the offer. Finally he deposed that the Respondents observed the rules of natural justice, acted lawfully and considered all the relevant factors in arriving at their decision. The application was said to have been made in bad faith and only meant to erode the public confidence in the Respondents.

7. The motion was canvassed by way of written submissions. Counsel for the Applicant submitted that the 1st Respondent was not properly appointed as the Chief of Kamiti Location as she was not a resident of Kamiti. Her academic qualifications were also said to be doubtful. Counsel also submitted that the 2nd Respondent was biased against the Applicant. It was submitted that the 2nd Respondent breached the Applicant's right to fair administrative action by failing to supply the results of the interview and written reasons as to why he did not qualify for the job.

The case of *Council of Civil Unions vs. Minister for the Civil Service (1985) AC 2 & an Application by Bukoba Gymkhana Club (1963) EA 478 AT 479* was relied on for the holding that to succeed in a judicial review application, the applicant ought to demonstrate that the decision impugned was tainted with illegality, irrationality and procedural impropriety. Counsel submitted that the 2nd Respondent's decision was tainted with illegality, was irrational, and marred by procedural impropriety, and did not meet the legitimate expectations of the Applicant and the residents of Kamiti Location. To support this submission counsel quoted the case of *Schon Noorani & Jack and Jill Limited vs The Principal Secretary Ministry of Internal Security, Judicial Review Application Number 615 of 2017*.

8. For the Respondents similar submissions were made to the effect that the 2nd to 5th Respondents in appointing the 1st Respondent,

observed the rules of natural justice and acted lawfully. They cited the case of **Republic v Kenya Revenue Authority & Another Ex-parte Bear Africa (k) Limited** where it was stated that judicial review is concerned with the process leading to a decision and not the merits of the decision. Counsel submitted that breach of legitimate expectation does not arise since the issue of the 1st Respondent's residence was conclusively determined. It was submitted regarding alleged breach of the right to fair administrative action, that the 1st applicant ought to demonstrate that the decision of the Respondents was absurd.

9. Reliance was further placed in the case of **Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** where it was held that the individuals affected should have the opportunity to present their case fully and fairly and decision made in a fair, open and impartial process. The Respondents submitted that it was not possible to inform all the applicants of the results of the interview outcome owing to the large number of applicants. In conclusion, the Respondents submitted that rules of natural justice were observed and that their decision was reasonable, rational and lawful. Thus they urged that the motion be dismissed for lack of merit.

10. The Court has considered the material canvassed in respect of the substantive motion. The basic facts surrounding the motion are not disputed. These include the fact that on 21st August 2017 the 2nd Respondent advertised the vacancy in the post of Chief Grade II in respect of Kamiti location. That several applicants among them the *ex parte* Applicant and the 1st Respondent responded by applying for the position. The two were subsequently shortlisted for interviews held on 23rd November 2017. That eventually, the 1st Respondent was selected as the best candidate and appointed to the position *vide* a letter Ref. No. C. 8/Vol. VI/66 erroneously dated 27th February 2017, rather than 2018. That the 1st Respondent having accepted the appointment was deployed.

11. The gravamen of the *ex parte* applicant's grievance is contained in grounds (a) to (g) of the Statutory Statement and in paragraphs 10 to 17 of the Verifying affidavit, both which formed the basis of the substantive motion. The gist of these grounds and depositions is that 1st Respondent did not qualify for the position in question as she was not a resident of Kamiti location; that there were other candidates better suited for the position, that no reasons were given for the decision to select the 1st Respondent; and that in appointing the said Respondent, the other Respondents failed to consider or ignored a complaint raised against her by some residents of Kamiti location.

12. It did appear from the submissions and material presented on both sides that the active litigants in this matter are the *ex parte* Applicant as pitted against 1st to 5th Respondents as the Interested Parties named did not participate in the proceedings. The scope of judicial review remains as stated by the **Court of Appeal in Municipal Council of Mombasa -v- Republic & Umoja Consultants Ltd. Civil Appeal No. 185 of 2001 (2002) e KLR:**

The Court of Appeal held that:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the person affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters..... The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision.” See also Republic -Vs- Kenya Revenue Authority *ex parte* Bear Africa (K) Limited (2013)eKLR

13. In **Pastoli -v- Kabale District Local Government Council and others (2008) EA 300** the court *inter alia* held that:

“In order to succeed in an application for Judicial review, the applicant has to show that the decision is tainted with illegality, irrationality, and procedural impropriety”

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere to and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision”

14. Although the *ex parte* Applicant purported in submissions to expand the grounds upon which his challenge was based, only two key complaints were raised in his pleadings, namely, the allegation that the 1st Respondent was not a resident of the area (Kamiti location) and the failure by the 2nd Respondents to give reasons. Thus in his view the entire process was marred by the Respondent's failure to deal with that question. Issues relating to the 1st Respondent's academic qualifications, her marital status, and irrationality in the awarding of points by the interview panelists were not included in the *ex parte* applicant's pleadings. Moreover, the challenge as to the best candidate among the interviewees and whether the 1st Respondent merited the appointment involves the question of merit and is not amenable to judicial review.

15. According to the Applicant, by allegedly failing to appoint a local resident to the position the 2nd Respondent acted illegally and violated the *ex parte* Applicant's legitimate expectation, in addition to the decision being tainted with procedural impropriety and bias on the part of the panel. As concerns the failure to give reasons, the *ex parte* Applicant asserts that his legitimate expectation was violated. The court has to be careful not to deal with the merits of the decision impugned, but rather to concern itself solely with the process. And unless the decision is so unreasonable as to defy logic, or was arrived at by failing to consider relevant matters while considering irrelevant ones, the court would not intervene by quashing such decision.

16. Whereas, the *ex parte* Applicant has not demonstrated the actual illegality of the decision by citing the substantive or procedural provisions of law thereby breached, it is beyond dispute that the recruitment process commenced with the advertisement (annexure **MWM1** to the Verifying Affidavit) which contained the requirements for appointment. Requirement No. 3 stated that candidates must be residents of Kamiti location. This was a relevant consideration. It could also be argued that by this and other requirements the 2nd Respondent was making a promise to the candidates and interested parties that all candidates would be interviewed against the stated criteria. Having obtained the necessary approvals, and by virtue of the requirements for the chief's position, the 2nd to 5th Respondents were entitled to lawfully make such a representation, and to be held to it.

17. The doctrine of legitimate expectation was developed by English courts to hold rulers to their promises. In the 4th Edition, 2001 Reissue, of **Halsbury's Laws of England** the authors at page 212, paragraph 92 explain the concept behind the development of the principle as follows:

“A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. In all instances the expectation arises by reason of the conduct of decision maker and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded.

The existence of a legitimate expectation may have a number of different consequences; it may give standing to seek permission to apply for judicial review, it may mean that the authority ought not to act so as to defeat the consequence of the expectation without some overriding reason of public policy to justify its doing so, or it may mean that, if the authority proposes to act contrary to the legitimate expectation, it must afford the person either an opportunity to make representations on the matter, or the benefit of some other requirement of procedural fairness. A legitimate expectation may cease to exist either because its significance has come to a natural end or because of action on the part of the decision maker.”

18. Lord Diplock also discussed the doctrine of legitimate expectation in the case of **Council of Civil Service Unions Minister for the Civil Service [1985] 374** concluding at page 408 thus:

“To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:

.....

by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.”

19. It appears that prior to conducting interviews, the 2nd Respondent sought a confidential background check on the shortlisted applicants. The report which is dated 15th November 2017 and authored by the Assistant County Commissioner, Tinganga Division, [annexure **KN4C**] contains personal information on all the six shortlisted applicants, including the *ex parte* Applicant. With regard to the 1st Respondent, the report contains details relating to her residence at Kamiti forest, education and employment status. The remark that she was not “generally not known locally” cannot in the circumstances be construed to mean that she was not a resident of Kamiti. The shortlisting criteria annexure (**KN3** annexure and interview score sheets annexure (**KN4b**) indicate that special attention was given to the candidates to demonstrate familiarity with local issues consistent with the criteria in the advertisement.

20. The 2nd Respondent was not necessarily obligated, having received the confidential report on the candidates and interviewed them, to inquire into the unsigned letter dated 5th December 2017 (**MNM 4**) purportedly written by Kamiti residents in opposition to the 1st Respondent’s candidature. Besides, there is no evidence that the said letter was served upon the 2nd Respondent for his attention. Thus in so far as the residence question is concerned, the 2nd Respondent reasonably performed his duty and took into consideration the relevant personal matters as discovered through a confidential background check.

21. Before this Court the 1st Respondent tendered uncontroverted evidences *via* documents of title, and her children’s academic records in asserting her residency in Kamiti. On the face of it all candidates were equally subjected to the criteria in the vacancy notice and interviewed on similar score sheets. The score sheets show how each candidate fared. In the circumstances, I cannot find any reason to fault the 2nd Respondent on the question of the residency criteria with regard to alleged illegality, procedural impropriety, bias or violation of legitimate expectation. In my own view the process put in place to vet the candidate’s compliance with residency criteria was reasonable and yielded reasonable and relevant information which was put into consideration by the panel.

22. It appears that the *ex parte* Applicant was relying on the fact that he did not personally know the 1st Respondent [see paragraph 7 of Verifying Affidavit], and the alleged complaint by so-called Kamiti ‘bonafide’ residents declaring the *ex parte* Applicant a “stranger.” On that score, this court finds no basis upon which to agree with the *ex parte* Applicant’s accusations of impropriety on the part of the 2nd Respondent and the interviewing panel.

23. Turning to the question of failure to give reasons for the decision to appoint the 1st Respondent, there is no evidence that the *ex parte* Applicant demanded to be given reasons as envisaged in section 6 of the Fair Administrative Action Act. Besides, the material relating to the entire recruitment process from advertisement to appointment is before the court. It is evident from the score sheets that the 1st Respondent emerged the best candidate and I agree that it is not practical to expect the selection committee to communicate the outcome of the recruitment process to all applicants.

24. This court is not concerned with the merits of the final decision. Suffice to say that the entire process appears to have been fairly carried out, giving every candidate a fair chance to compete for the position, based on the criteria set out in the advertisement. Further that in arriving at their decision the 2nd to 5th Respondents took into account the relevant considerations.

25. In the result, this court finds no merit in the substantive motion. It is dismissed with costs.

DELIVERED AND SIGNED AT KIAMBU THIS 7TH DAY OF FEBRUARY 2019

C MEOLI

JUDGE

In the presence of:-

Mr. Njuguna holding brief for Mr. Nganga for ex parte Applicant

Mr. Nganga Kimani for 1st Respondent

Court Clerk – Kevin/Nancy