



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 20 of 2011

REPUBLICAPPLICANT

VERSUS

THE INSPECTOR GENERAL (STATE CORPORATIONS).....RESPONDENT

EX-PARTE

ISAIAH F KIPLAGAT

JUDGMENT

Subsequent to the grant of leave to commence these judicial review proceedings, Isaiah F Kiplagat, the ex-parte applicant herein filed a notice of motion dated 23rd February, 2011 in which he seeks orders as follows:-

- (a) An order of certiorari directed to The Inspector General (Corporations) to remove into this Honourable Court and be quashed his decision of 9th of August, 2010 to surcharge the Applicant on account of payment of inland charges which had already been included in the quoted price of Kenya Shillings Three Hundred Thousand (Kshs.3,300,000) under certificate of surcharge No. 143 dated 9th of August, 2010.**
- (b) An Order of Certiorari to remove into this Honourable Court and be quashed the Certificate of Surcharge Number 143 dated 9th of August, 2010 for Kshs.2,051,763 against Isaiah F Kiplagat as the Former Managing Director of the Kenya Post Office Savings Bank.**
- (c) An Order of Prohibition directed to The Inspector General (Corporations) prohibiting him and any officer or servant of the Inspectorate of State Corporations from enforcing or putting into effect or directing others to enforce or put into effect Certificate of Surcharge No. 143 dated 9th August, 2010 issued against the Applicant as the Former Managing Director of the Kenya Post Office Savings Bank.**
- (d) THAT the Honourable Court be pleased to give further orders or directions as it may deem fit and just to grant.**
- (e) THAT the cost of this application be provided for.**

The application is grounded upon the statutory statement and the verifying affidavit of the applicant all

dated 3rd February, 2011. It is also supported by the application for leave and the annexures to the said application. According to the statutory statement the grounds upon which the reliefs are sought are (a) the respondent's decision was made without legal basis and is a gross abuse of office; (b) the decision was prompted by malice, ill will, improper motives and bad faith; and (c) the decision was arrived at without due regard to the rules of natural justice.

The respondent opposed the application by way of a replying affidavit sworn by Peter B Ondiek the Inspector General of State Corporations. The gist of the reply is that the applicant was given an opportunity to be heard and he was all along aware about the proceedings before the State Corporations Surcharge Committee (SCSC).

Let me start by thanking the advocates on record for their industry in this matter. They have cited useful authorities and although I may not refer to all the authorities directly, I assure them that the said authorities will play a role in the outcome of this matter.

The ex-parte applicant's attack on the decision of the respondent is that the same is tainted with bad faith since it was arrived at 12 years after the alleged misappropriation of state funds and 7 years after the ex-parte applicant had ceased being the Managing Director of Kenya Post Office Savings Bank (Post Bank). Secondly the ex-parte applicant submits that the respondent breached the rules of natural justice by failing to accord him an opportunity to defend himself before reaching the decision in question.

In response, the respondent submitted that there is no time limit for recovering state money and the fact that there was a delay in surcharging the ex-parte applicant should not be an issue. The respondent also argues that the rules of natural justice were complied with in that there was constant communication between the parties before the decision was made.

There are three issues for determination in this case. The first issue is whether the respondent breached the rules of natural justice while handling the ex-parte applicant's case. The second issue is whether the respondent's action was driven by ill-motive, bad faith and without legal basis. The third issue is costs.

The starting point is an introduction to the concept of natural justice. The concept of natural justice is founded on two cardinal principles namely that no man should be a judge in his own cause and no man should be condemned unheard. In the case before me there is no claim that the ex-parte applicant's accuser also acted as a judge in the matter. As such, I am only concerned with establishing whether the ex-parte applicant was given an opportunity to defend himself. The importance of an opportunity to be heard can never be overemphasized. Lord Denning reminded us in **KANDA V THE GOVERNMENT OF MALAYA (1962) AC 322** at page 337 that:-

“If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.”

The question therefore is whether the ex-parte applicant was accorded the treatment demanded by the principles of natural justice. In order to understand what happened, I will now turn to the exhibits availed to the court by the parties. The ex-parte applicant was through the respondent's letter of 22nd September, 2009 notified of the intention to surcharge him for loss of Kshs.2,164,763/= at Post Bank. He was given 14 days to show cause why he should not be surcharged for authorizing **“irregular payment of Kshs.2,051,763/= as additional inland charges which was already included in the quoted price of Kshs.3,300,000 for the Peugeot 605 SR.”** He promptly responded through a letter dated 30th September, 2009 explaining why he should not be surcharged. His letter was met by the respondent's letter dated 13th October, 2009 asking him to appear before the SCSC on 26th October, 2009 so as to clarify a few issues relating to the matter. He did not appear before the SCSC as directed but on 27th October, 2009 his counsel wrote to the respondent asking for certain documents so as to enable them respond to the allegations. The respondent wrote back to the ex-parte applicant's advocates on 30th November, 2009

forwarding some documents to them and indicating that it could not supply all the documents requested since some of those documents were not in its custody. On 18th December, 2009 the ex-parte applicant's advocates wrote back to the respondent acknowledging receipt of the documents and indicating that one of the documents was not enclosed. The letters were exchanged up-to the following year. The last letter was dated 9th August, 2010 from the respondent to the ex-parte applicant informing him that he had been surcharged. Attached to the letter was Certificate of Surcharge Serial No. 143 dated 9th August, 2010.

The ex-parte applicant's complaint is that even as he was corresponding with the respondent, the SCSC had already surcharged him on 2nd December, 2009 as per the minutes attached to his application. In the said minutes the SCSC had recommended that:-

“Mr. Isaiah K Kiplagat be surcharged Kshs.2,164,763 being additional cost that the bank incurred on Peugeot 605 SR”.

This fact was not denied by the respondent. It is therefore assumed that the decision to surcharge the ex-parte applicant was made on 2nd December, 2009. The ex-parte applicant may on the face of it, therefore appear to be correct when he alleges that his defence was not taken into account. A closer scrutiny of the facts, however, reveals that the ex-parte applicant should not heard to say that he was never given an opportunity to be heard. He was informed in good time about the allegations and he responded to the same. Thereafter he was invited for an oral hearing but he never attended. His advocate was given the documents the respondent had. The ex-parte applicant then went ahead to demand documents in the hands of third parties. According to the ex-parte applicant (paragraph 17 of the verifying affidavit) all documents required in his defence were received by 13th April, 2010. Even after the ex-parte applicant had received all the documents he did not take any step until the time he was informed of the surcharge through the letter dated 9th August, 2010.

Can one say the ex-parte applicant was afforded an opportunity to present his defence? In the circumstances of this case the answer is in the affirmative. He did respond to the first letter and gave his side of the story. He was given an opportunity to appear before the SCSC for an oral interview on 26th October, 2009 but he failed to do so without giving any reason. Although he was given the documents which he said he required so as to prepare his defence, he never wrote to the respondent to state his defence and neither did he seek an audience with respondent. For close to four months from April to August 2010 he did nothing about his case. The respondent was therefore entitled to make a decision. If he had written to the respondent between April, and August, 2010 he could have been justified to claim that his defence was not taken into account since the decision to surcharge him was made in December, 2009. It is clear however that he never took the opportunity accorded to him to defend himself. He was casual about the allegations against him. He cannot now be heard to complain about the way his matter was handled by the respondent. In any case, he had already put forward his defence through the letter dated 30th September, 2009 and there is no evidence that the said letter was not taken into account before the decision to surcharge him was made. In the circumstances of this case, I am of the view that the rules of natural justice were not breached.

The issue of delay in surcharging the ex-parte applicant was cited as evidence of bad faith on the part of the respondent. It is unfortunate that the respondent did not treat this issue with the seriousness it deserved. The replying affidavit does not disclose much. The respondent ought to have explained why it took long to surcharge the ex-parte applicant. However, delay in itself is not proof of improper motive or bad faith. The ex-parte applicant needed to demonstrate that there was an evil wind driving the allegations against him. He did not do so and neither did he adduce evidence to show bad faith. With the insufficient evidence placed before the court by both sides, it is hard to make any objective findings on the delay. The surcharge complained of by the applicant arose out of an alleged misuse of public funds. The courts must protect the taxpayer's money. I find nothing to make me attribute the respondent's delayed action to bad faith.

The respondent in surcharging the ex-parte applicant was acting within the powers provided by statute. The court finds no reason to meddle with the duties of the respondent. This application therefore

fails and the same is dismissed with costs to the respondent.

Dated and signed at Nairobi 11th day of October , 2012

W. K. KORIR, J