REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Civil Appli 1203 of 2007

IN THE MATTER OF AN APPLICATION BY NGEI WA MUTINDA FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT, CHAPTER 265 LAWS OF KENYA

REPUBLIC …….……...……. APPLICANT

V E R S U S

1. THE PERMANENT SECRETARY MINISTRY

OF LOCAL GOVERNMENT.....…1^{1ST} RESPONDENT

2. THE PUBLIC SERVICE COMMISSION…...…2ND RESPONDENT

3. THE HON. THE ATTORNEY-GENERAL…….3RD RESPONDENT

EX-PARTE

NGEI WA MUTINDA

J U D G M E N T

Before me is an application by way of Notice of Motion dated 20th November, 2007, filed by E.K. Mutua & Company advocates for the exparte applicant named as NGEI WA MUTINDA. The application was filed on 21st November, 2007 and was filed pursuant to Order 53 rule 3 of the Civil Procedure Rules, and pursuant to leave granted on 13th November, 2007.

The Orders sought are two, that is;-

1. *THAT* ***Judicial Review Orders of Certiorari do issue to call up into the High Court to quash the proceedings and decision made on 20th June, 2007 and or 23rd June 2007 and or 23rd October 2007 by the Public Service Commission and or the Permanent Secretary Ministry of Local Government to dismiss Ngei Wa Mutinda from employment.***

2. *THAT* ***costs be provided for:-***

The application is grounded on the **STATEMENT OF FACTS** dated 12th November, 2007 and the

VERIFYING AFFIDAVIT SWORN by the *ex-parte* applicant on 12th November, 2007, both of which were filed with the Chamber Summons for leave as required by law. The grounds of the application are, *inter alia*, that the Local Government Act and Public Service Commission ***(Local Authority Officers)*** Regulations provide an elaborate procedure under which the Minister may discipline a Clerk to a local authority. Secondly, that the procedure for suspension of a Clerk to a Local Authority is spelt out under the Public Service Commission (***Local Authority Officers)*** Regulations 1984 and 1988 Gazette Supplement No. 82 of 23rd November 1984 and No. 11 of 11th March, 1988, where the requirement is that-

(i) The Permanent Secretary advises the Minister to appoint an Inspector under Section 231 and 245 of the Local Government Act for an investigation into any alleged charges.

(ii) If the Permanent Secretary is of the opinion that the Clerk may interfere with investigations by the Inspector, then he directs the Local Authority concerned to interdict or suspend the Clerk until the inspector completes the work.

It is contended in the application that it was the Permanent Secretary, and not the Local Authority which issued the letter of suspension. The Permanent Secretary also appointed persons to carry out a routine inspection rather than an extra-ordinary inspection and examination, as required by law. It was upon that routine inspection that the applicant was later dismissed, even in the face of stay orders granted by the court on 11th April 2007 in Misc. HC. Civil Application 367 of 2007, when leave was granted to commence judicial review proceedings.

The **VERIFYING AFFIDAVIT** gives the factual circumstances surrounding the case. It is deposed in the said affidavit that the action against the applicant was actuated by a complaint from the Minister for East African Community, Hon. Koech, which complaint was due to malice as the said Hon. Koech was a rate defaulter of the Bomet Municipal Council.

In response, the respondents filed a replying affidavit sworn on 22nd April, 2008 by **BERNADETTE MWIHAKI NZIOKA,** the Secretary of the Public Service Commission. It was deponed that by a letter dated 23rd October, 2007, the applicant was dismissed from service by the Public Service Commission on account of abuse of office, while he was Clerk of Bomet Municipal Council. It was deponed that the applicant was suspended from service vide the Permanent Secretary's letter of 16th March, 2007 and that the 2nd respondent ***(Public Service Commission)*** was not a party in High Court Miscellaneous Application No. 367 of 2007 and therefore the order therein was not served upon the 2nd respondent. It was deponed that under regulation 33(1) of the Public Service Commission ***(Local Authority Officers)*** Regulations 1984, the Permanent Secretary had powers to direct suspension of a Clerk to Council in furtherance of Section 106(13) of the Constitution. It was also deposed that the Permanent Secretary acted within his powers, and that there was no error of procedure or breach of principles of natural Justice.

The respondents also filed grounds of opposition dated 10th November, 2008. The grounds of opposition are, *inter-alia*, that the issues relate to a contractual relationship between an employer and employee; that the application is misconceived and bad in law; that it is incurably defective; and that the applicant should have appealed against the summary dismissal instead of filing Judicial review proceedings .

At the hearing, Mr. E.K. Mutua appeared for the *ex-parte* applicant, while Mr. Kirori a Principal State Counsel appeared for the respondents. Mr. Mutua for the applicant submitted that the issue was the quashing of the decisions made on 20/6/2007 but communicated in a letter dated 23rd October, 2007 dismissing the applicant from service. Counsel argued that though the decision to suspend the applicant had been stayed by the court and that order served, the 2nd respondent, the Public Service Commission, went ahead to deliberate on the matter and dismissed the applicant. Counsel contended that the Permanent Secretary should have informed the 2nd respondent of the decision of the Court. Counsel argued that there were already contempt proceedings pending in Misc. HC. Application No.367 of 2007.

Counsel argued that the procedure adopted by the respondents denied the applicant a chance to appeal, since the decision to dismiss him was made on 20/6/2007 but was communicated on 23/10/2007. As a result the applicant could not appeal, as an appeal was required to be lodged within 6 weeks of the decision. That alone, justified the intervention of this court.

Secondly, regulation 33(1) requires the Secretary of the Public Service Commission to communicate the decision to the Clerk ***(the applicant)***. Instead, it was the Permanent Secretary who communicated the dismissal. That also justified intervention by this court.

Thirdly, the applicant is entitled to a hearing under regulation 33(9). The 2nd respondent did not inform the applicant that he was subject to disciplinary proceedings, so that he could attend and defend himself. Counsel also submitted that the 1984 Regulations were not revoke as alleged by the respondents, but were improved upon by regulations of 1988. Counsel lastly, argued that this was not a private employment arrangement was such, as the respondents were Public institutions or officials acting under statutory powers and regulations. Counsel argued that the judicial review proceedings for certiorari were commenced within 6 months.

Mr. Kirori for the respondents, submitted that the 2nd respondent was not a party in the proceedings where stay orders were granted. Therefore, they could not be served and was not bound by the stay orders granted by court in those proceedings.

Counsel also argued that the Permanent Secretary, under the 1984 and 1988 Regulations, had powers to suspend. Counsel further argued that what is sought to be quashed through certiorari was a letter of dismissal. That letter was in the nature of relationship between an employer and employee, which is the area of private law, not judicial review. The applicant should have appealed, rather than come to the judicial review court. He had come to court with unclean hands.

Counsel also challenged this Judicial review application on the grounds that it should have been filed within 6 months of the decision.

Reliance was placed on the case of **REPUBLIC –Vs- BRITISH BROADCASTING CORPORATION – EX PARTE LAVILLE (1983) 1 WLR 1302 CA –** where it was stated that Judicial review remedies are not available in a situation of employer employee relationship. Reliance was also placed on the case of ***REPUBLIC –VS- SENIOR PRINCIPAL MAGISTRATE KISII & OTHERS – Nrb HC Misc. Application 321 of 2006*** *(unreported),* where the court held that judicial review remedies can be granted only where they are the most efficacious remedy.

I have considered the application, documents filed, submissions of counsel and authorities cited.

The first issue is whether the application was filed outside the period allowed by law. Counsel for the respondents has argued that the application was filed outside the 6 months period allowed by law.

Order 53 rule 2 of the Civil Procedure Rules, provides for a time limit within which to make an application for leave for orders of certiorari in certain cases. It provides as follows:-

"***2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of being quashed, unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as many be prescribed by any Act, and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."***

It is clear that the above provisions relate to the application for leave. The dismissal letter was dated 23rd October 2007, while the Chamber Summons for leave was filed on 13th November 2007. On the other hand, the decision of the Public Service Commission dismissing the applicant was purported to have been

made on 20th June 2007. Firstly, six months had not lapsed when the application for leave was filed on 13th November, 2007, as the decision challenged was made on 20th June, 2007. Secondly, courts have held that the above provisions limiting time to 6 months relate only to proceedings where a judgment, order, decree, or conviction has been made. Not all certiorari situations are governed by this rule. In my view, this is not a case that would be governed by the six months limitation rule.

Even if this were a situation governed by the 6 months limitation rule, my view is that, a Public institution or official cannot make a decision, keep it as a secret until the statutory limited time lapses, and then defend itself on the basis of the said time lapse. In my view, the time starts running only when the complainant can reasonably be said to have had knowledge or notice of the decision. In this case knowledge can be said to have been had on or after 23rd October 2007. I dismiss that objection.

The second issue is whether the 2nd respondent is guilty of contempt. The High Court's and Court of Appeal's jurisdiction on contempt of court is provided for under Section 5 of the Judicature Act **(Cap.8).** Courts have held that it would require a party to be served and to disobey a court order, in order to entitle the Court to make a finding of contempt of court. See ***OKOTH –VS- WADE [2005] IKLR 399***. In our present case, the application for contempt, is not the application that is before me for decision. I will not pretend to determine the same. Mine here is merely to determine whether the complaint of the applicant is one that falls within judicial review jurisdiction; whether there were violations giving rise to judicial review remedies; and whether the requested judicial review remedies should be granted.

On the issue whether this is a matter that invites the judicial review jurisdiction, it has been argued by counsel for the respondents that this is a private employment contract matter that cannot invite judicial review remedies.

Indeed, judicial review jurisdiction is in the purview of public law, not private law. In normal circumstances, employment contracts under the Employment Acts are not the subject of judical review. I fully agree with what was held in the English case of ***R. -vs- BRITISH BROADCASTING CORPORATION – EX PARTE*** **LAVELLE** ***(supra),*** where it was stated in the Queens Bench Division as follows-

"……***Since the disciplinary procedure under which the applicant was dismissed arose out of her contract of employment and was purely private and domestic in character, the applicant*** **was not entitled to relief by way of certiorari ……..."**

In our present case however, the respondents were acting by virtue of the written law, rather than the Employment Acts. They were acting by virtue of section 106(13) of the Constitution. They were also acting by virtue of the Local Government Act ***(Cap 265),*** the Service Commission Act ***(Cap.185)*** and the Public Service Commission ***(Local Authority Officers)*** Regulations 1984, and 1988 vide Gazette Supplement No. 82 of 23rd November 1984 and No. 11 of 11th March 1988. The respondents cannot claim that this was a strictly private or domestic contract of employment, since it was regulated by laws and regulations outside the general Employment Acts. There was therefore statutory underpinning. The respondents were also public officials or institutions acting by virtue of powers conferred on them by specific provision of the written laws and regulations made thereunder. I find and hold that this is not a private or domestic contract of employment. I also hold that the judicial review jurisdiction of this court can validly be invoked herein.

Did the respondent act irregularly as alleged? Mentions have been made by Counsel for the parties on both sides regarding, the letter of suspension. However, what is before the court is a complaint on the decision and the letter of dismissal. This letter is reproduced herein below. It reads-

"Mr. Ngei Wa Mutinda

Town Council of Kangundo

P.O. Box 56

TALA. October 23rd 2007

SUMMARY DISMISSAL

I hereby convey the decision of the Public Service Commission of Kenya vide their letter Ref. D/MU/1500 dated 20th June 2007 that you be dismissed from the Service with effect from 16th March 2007 on account of abuse of office while serving as a Clerk in Bomet Municipal Council.

You are therefore required to vacate the office with immediate effect. The Town Treasurer will take over on acting basis until the Ministry identifies a suitable replacement.

Please note that you have the right to appeal against the decision with 14 days from the date of this letter.

SS. Boit, CBS

PERMANENT SECRETARY"

The said letter was copied to the Controller & Auditor General, the District Commissioner Kangundo, and the Provincial Local Government Officer Eastern Province.

In my view, the decision in the letter is patently irregular. It is a dismissal letter that flies in the face of clear specific statutory and regulatory requirements, both in content and procedure.

I say so because the facts herein, disclose blatant breaches of all the requirements under regulation 33 of the Public Service Commission ***(Local Authority Officers)*** Regulations, made under the Service Commissions Act ***(Cap. 185).***

The said regulation provides –

33(1) where the Permanent Secretary to the Ministry for the time being responsible for local government considers it necessary to institute disciplinary proceedings, including dismissal, against a clerk to council on the ground of misconduct which, if proved, would in his opinion justify any of the punishments mentioned in regulation 26, he will advise the minister to appoint an inspector, under sections 231 and 245 of the Local Government Act, to carry out investigations in the charge or charges on which disciplinary action is to be taken against the Clerk to Council.

(2) ***If in the opinion of the Permanent Secretary the presence of the Clerk to Council in office shall hinder the smooth performance of the duties of the inspector, he shall direct the local authority to interdict, suspend or send the Clerk to Council on compulsory leave until the inspector has completed his investigations.***

(3) ***The inspector shall inform the Clerk to Council that on a specific day the charges against him will be investigated and that he shall be allowed or, if the inspector so determines, shall be required to appear before him to defend himself.***

(4) ***If witnesses are examined by the inspector, the Clerk to the Council shall be given an opportunity of being present and putting questions on his own behalf to the witnesses and no documentary evidence shall be used against him unless he has previously been supplied with a copy of it or given access to it.***

(5) ***If in the course of investigations, grounds for framing additional charges are disclosed, the inspector shall inform the Clerk to Council in writing of the new charges.***

(6) ***The inspector having investigated the matter shall forward his report to the minister together with***

the charges framed, the evidence led, and other **proceedings revealed in the investigations and the report of the inspector shall include-**

(a) ***The charge or charges proved against the clerk to council and the inspectors judgment;***

(b) ***the details of any matters which in the inspector's opinion aggravated or alleviate the gravity of the case; and***

(c) ***a summing up and any such general comments as will indicate clearly the opinion of the inspector on matters being investigated, but the inspector shall not make any recommendations regarding the form of punishment to be inflicted on the Clerk to Council.***

(7) ***The Minister, after consideration of the report of the inspector, shall if he is of the opinion that the report should be amplified in anyway or that further investigations is desirable, refer the matter back to the inspector for further investigation and report.***

(8) ***The Minister after considering the report of the inspector and being satisfied that the charges against the Clerk to Council have been proved will forward to the Clerk to Council a statement of the charge or charges framed against him together with a brief statement of the allegations in so far as they are not clear from the charges themselves, on which each charge is based, and shall invite the Clerk to Council to state in writing should he so desire, before a day to be specified, any grounds on which he relies to exculpate himself.***

(9) ***If the Clerk to Council does not furnish a reply to a charge or charges forwarded under paragraph (7) within the period specified or if in the opinion of the minister he fails to exculpate himself, the Permanent Secretary in the Ministry for the time being responsible for Local government shall forward to the Commission a statement of the charge or charges, the reply, if any, of the Clerk to Council, and a recommendation of the type of punishment to be preferred against the Clerk to Council.***

(10) ***The Commission shall decide on the punishment, if any, which should be inflicted on the Clerk to Council.***

(11) ***The Secretary shall inform the Clerk to Council***

(a) of the finding on each charge which has been preferred against him;

(b) ***of the punishment, if any, to be inflicted upon him; and***

(c) ***that an appeal may be lodged within six Weeks from the conclusion of such proceedings"***

From the above, the Permanent Secretary was merely required to advise the Minister to appoint an inspector under Section 231 and 245 of the Local Government Act ***(Cap. 265)*** to carry out investigations. It was the Minister to appoint investigators. There is no indication that such recommendations were made for the appointment of a Committee to carry out an extra-ordinary inspection as required by the above sections of the law. Instead, two persons named as Charles Muthuri and Nyabuto Okebiro appointed by the Permanent Secretary appear to have carried a routine inspection of Municipal Council of Bomet between 5th – 12th March, 2007 because of a complaint raised by a third party Hon. John Koech, then Minister for E.A. Community. It is on the basis of their report that the applicant was suspended and later dismissed. Because the law was not followed, the report could never be a basis for disciplining the applicant. More importantly, only the Minister could appoint the investigating team. The Permanent Secretary had no legal basis to appoint the routine audit team, and use the same as a basis of disciplining a Clerk to Council. It was an illegal act by the Permanent Secretary, a Public Officer.

The other function of the Permanent Secretary was to forward the views of the Minister, the charges and recommendations on punishment to Public Service Commission, if the Minister considers that the clerk

has not exculpated himself. This does not appear to have been done at all.

The suspension by the Permanent Secretary was also illegal. The above regulations clearly show that it is the Local Authority, on recommendations of the Permanent Secretary that can suspend a Clerk. It is not a function of the Permanent Secretary to suspend. The suspension was also illegal. These are preliminaries points, and I will now go to substantive issues.

The more substantive defaults with regard to the dismissal of the applicant are the failure to comply with mandatory requirements of the regulations, which were meant to protect a Clerk to Council's rights, and ensure observance of the principles of natural justice and fair hearing. It was mandatory under the regulations that the applicant be informed of the charges against him, and be given an opportunity to defend himself, be given copies of all documents to be used against him and question all witnesses. All these were not done. Therefore the respondents' allegations against the applicant are a sham. Those allegations, from the facts disclosed, actually appear to be malicious and meant to shift blame to a wrong party, the applicant.

Again, the inspectors, if properly appointed ***(which they were not)*** were required to forward their formal report and charges and statements to the Minister, who would, if satisfied, forward the charges to the Clerk together with a brief statement, for the clerk to respond to the same in writing. This was also not done. In effect, the applicant was denied two stages of mandatory opportunity to defend himself. Firstly, he was by law entitled to defend himself at the investigation stage, and secondly at the time that the Minister was considering the report. Both of these were denied him. He does not even appear to know what charges were forwarded to the Public Service Commission against him.

The failure of the Permanent Secretary to comply with the above mandatory requirements of the law, is clearly unlawfully an abuse of public power. The Permanent Secretary acted oppressively and in bad faith, contrary to the applicant's legitimate expectations as a public officer who is entitled to the due process of the law as provided in the Constitution, Acts of Parliament, and the regulations made thereunder, especially the clear relevant regulations herein earlier referred to.

That is not all. The letter of dismissal is signed by the Permanent Secretary. Under regulation 11 it was the Secretary of the Public Service Commission to communicate the decision to the Clerk. In my view, there is no problem with the Permanent Secretary forwarding the letter from the Secretary Public Service Commission to the Clerk. However, the actual letter of dismissal had to be signed by the Secretary or someone authorized on his or her behalf. This is a mandatory requirement imposed by the regulations. To date, I have not been told that the Secretary of the Public Service Commission dispatched a letter to the applicant. In effect, it means the applicant has never been dismissed. Even if there was justification, which this court finds none, the applicant cannot be dismissed by a letter from the Permanent Secretary

Further, in regard to the same issue of the letter of dismissal not being signed by the Secretary of the Public Service Commission, I reiterate what I stated in the case of ***REPUBLIC –VS- KENYATTA UNVERSITY SENATE & OTHERS*** - Miscellaneous H.C. Application No. 1285 of 2007, thus -

"***It is important that where there are statutory institutions or committees, they act in that name when they are making decisions. Otherwise you will get bureaucrats pretending to act and usurping the functions of those statutory institutions. The Registrar Academic is not the Senate. The Deputy Vice Chancellor is also not the senate."***

In my view communication, which by law is from a decision of the Public Service Commission has to be signed by the appropriate and legally recognised official of that Commission, and bear the letter heads of that institution. That is the closest we can reach to authenticity and good faith.

Having found the above irregularities, can I grant the certiorari orders prayed for? I am mindful that certiorari orders are discretionary.

In the case of ***REPUBLIC –VS- SENIOR PRINCIPAL MAGISTRATE & OTHERS – Misc. Application No. 321 of 2006*** – Wendoh J. held that judicial review remedies are discretionary and the court has to consider whether they are the most efficacious in the circumstances of the case. I am aware that the applicant herein has been purportedly dismissed and can sue for damages.

In my view, however, circumstances of this case are such that it is clear that senior government officers have decided to blatantly disregard and disobey the law which they were legally required to uphold. This case is clearly distinguishable from the case of ***R -Vs- JUDICIAL SERVICE COMMISSION OF KENYA – EX-Parte Pareno – Nrb H.C. Miscellaneous Application No. 1025 of 2003.*** The issue herein smarks of vindictive politics, with no basis for taking any disciplinary action against the applicant. In addition, the Public Service Commission, which was to communicate the dismissal to the applicant has not to-date, delivered a letter to the applicant that he was so dismissed. In effect the applicant has actually not been dismissed, as the law is that only the Public Service Commission can dismiss or punish him. This is a case where, in my view, the judicial review remedy of certiorari is the most efficacious in the circumstances. I will therefore grant the relief sought.

Consequently, I allow the application and grant the certiorari order sought, and the decision complained of has been quashed forthwith. I award the costs of these proceedings to the applicant against the respondents jointly and severally.

It is so ordered.

Dated and delivered at Nairobi this 4th day of May, 2009

GEORGE DULU

JUDGE

In the presence of-

Ms. Nthuku for applicant

Mr. Makongo for the respondents.