REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, SHAH & PALL, JJ.A.)

CIVIL APPEAL NO. 113 OF 1997

BETWEEN

1. WYCLIFFE MAKOKHA

2. MURIUKI KINOTI

3. JOHN WAIGANJO

4. GITHINJI WOHORO.....APPELLANTS

AND

NAIROBI CITY COUNCIL.....RESPONDENT

(Appeal from a ruling of the High Court of Kenya at Nairobi (the Honourable Mr. Justice Kuloba) dated 16th May, 1997

in

H.C. MISC. CIVIL APPLICATION NO. 479 OF 1997)
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JUDGMENT OF THE COURT

Wycliffe Makokha, Muriuki Kinoti, John Waiganjo and Githinji Wohoro (the employees) were employed by the City Council of Nairobi (the Council) in the Council's Department of City Planning and Architecture under the Director of City Planning and Architecture.

Each of the employees received a letter dated 5th May, 1997 from the office of the Town Clerk of the Council. Those letters were presumably received on 9th May.

The material part of each of the said letters reads:

"For these reasons you are hereby interdicted from duty with half salary with immediate effect. This is in accordance with Rule 23 of Public Service Commission (Local Authority Officers') Regulation 1984.

You are required within the next (10) days from the date of this letter to show cause why your service with this Council should not be dispensed due to this gross misconduct."

The letters in question were signed on behalf of the Town Clerk by one, Mr. C.I. Muiruri.

The employees then, instead of showing cause as they were required to do, sought leave from the superior court to apply for an order of Prohibition to prohibit the Council from instituting dismissal proceedings against them pursuant to the said letters and at the same time sought an Order to the effect that the grant of such leave do operate as a stay of proceedings for their dismissal from service of the Council.

The learned judge (Kuloba J.) in a terse ORDER ruled as follows:

> "Fear of dismissal from employment cannot found action for judicial review, for wrongful dismissal is dealt with under a different process from that of judicial review. I refuse to grant leave to seek orders sought."

We bear in mind that the employees were interdicted pending the showing of cause as stated in the said letters. They were given an opportunity to show cause why their employment should not be terminated. They were to show cause by 15th May, 1997 at the earliest. They could have asked for more time. They did not. Instead they moved the superior court as pointed out by us. This, they did on 16th May, 1997 by application dated 15th May, 1997.

The employees' contracts of employment are subject to the provisions of the Public Service Commission (Local Authority Officers) Regulation 1984. Regulation 23(1) of these Regulations empowers the clerk to the Council (the Town Clerk in this case) to interdict an employee (the local authority officer) if the clerk is satisfied that public interest requires that a local authority officer should cease forthwith to exercise the powers and functions of his local authority office.

As yet no dismissal proceedings were instituted against the employees. They were interdicted and called upon to show cause as earlier pointed out. They sought orders to prohibit the Council from instituting dismissal proceedings when they were not yet dismissed. To that extent the application was premature.

Mr. Mwangi who argued the appeal before us in an admirable manner relied on, in particular, the case of Peter Oketch Kadamas & Oloo v. Municipality of Kisumu [1982-88] 1 KAR 838. In that case the appellants were dismissed from the service of the municipality without loss of benefits with effect from the date of their initial suspension from duty on 20th March, 1989. Kadamas and Oloo made representations to the Minister through their Union and an investigator appointed under S.7 of the Trades Disputes Act recommended that they be reinstated and a heads of department meeting on 7th October, 1983 resolved to reinstate them. However, the Finance, Staff & General Purposes Committee of the Municipality met on 28th December, 1983 and recommended that the Municipality's earlier decision to dismiss the appellants be reaffirmed. This Court (Hancox & Nyarangi, JJ.A and Platt Ag. J.A. as they then were) held that those particular circumstances called for an order of prohibition. The situation in this case is different. The employees had not been dismissed. They came to court prematurely.

Mr. Mwangi also relied on the case of **Mirugi Kariuki v. the Attorney Genera**l Civil Appeal No. 70 of 1991, unreported. But, in that case the Attorney General, whose duty it was to decide whether or not Mr. Mirugi Kariuki's request to obtain services of a Queen's Counsel was proper, did not allow Mr. Kariuki to show cause **(inter alia**) why his request for a foreign advocate should not be granted. The case of Mr. Kariuki is distinguishable. In this case the employees although given an opportunity to show cause did not do so. As already pointed out, they came to superior court prematurely.

The case of **Kisima Farm Limited** [1978] KLR 36 also relied upon by Mr. Mwangi simply decided that the existence of a right of appeal from the decision of the Commissioner of Lands in determining claims to compensation under Section 9 of the Land Acquisition Act did not preclude the grant of an order of prohibition.

In our view, although the learned judge declined to grant the orders sought on the basis that dismissed employees have other remedies, in the end, came to the correct decision. He did so by wrong reasoning. The plain fact is that (and it bears repetition) the appellants came to court too soon.

This appeal is dismissed but with no order as to costs.

Dated and delivered at Nairobi this 24th day of October, 1997.

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

G. S. PALL

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR