



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

JUDICIAL REVIEW CAUSE NO.2 OF 2019

IN THE MATTER OF AN APPLICATION FOR ORDERS OF PROHIBITION AND CETIORARI AGAINST THE COUNTY ASSEMBLY OF SAMBURU

REPUBLIC.....APPLICANT

VERSUS

COUNTY ASSEMBLY OF SAMBURU.....RESPONDENT

AND

RAPHAEL LEMITIN.....1ST SUBJECT [ex parte applicant]

MARK LCHARUNI.....2ND SUBJECT [ex parte applicant]

SAMBURU WATER AND SANITATION COMPANY..3RD SUBJECT [ex parte applicant]

AND

THE COUNTY GOVERNMENT OF SAMBURU.....INTERESTED PARTY

RULING

The 3 subjects (ex parte applicants) by application and Notice of Motion dated 7th February, 2019 are seeking for the following orders;

- 1. The court issues an order of prohibition to stop the implementation of the report and the recommendations contained in the "SPECIAL REPORT ON SAMBURU WATER AND SANITATION COMPANY" which was compiled by the respondent.*
- 2. The court issues an order of certiorari to quash the report and the recommendations contained in the "SPECIAL REPORT ON SAMBURU WATER AND SANITATION COMPANY" which was compiled by the respondent.*
- 3. Costs of the application be borne by the respondent.*

The application is made on the grounds and statutory statement that the 1st and 2nd applicants are directors of the 3rd applicant, Samburu Water and Sanitation Services while the 3rd applicant is a public company limited by guarantee and wholly owned by the interested party. The 3rd applicant is a public company registered under the provisions of the Company Act and has an independent corporate existence and it has capacity to contract on its own capacity. As a public company, the 3rd applicant has the statutory mandate to ensure directors are drawn from all sectors and in this case, the County Government of Samburu, 2 members from business and manufacturing community, a representative from the professional body, resident organisations, managing director and a chief officer from the county government.

The directors, being representatives of divers interests draw their mandate from the appointing bodies and their employment contracts can only be terminated by the appointing bodies.

The respondent purported to compile a report which was titled "SPECIAL REPORT ON SAMBURU WATER AND SANITATION COMPANY" where it as recommended that the entire board and including the 1st and 2nd applicants be disbanded and a new board be appointed within 90 days. He report was forwarded to the interested party and he applicants are apprehensive that their employment contracts will be terminated at the expiry of 90 days.

In compiling the report and making recommendations to terminate the employment contracts of the applicants, the County assembly of Samburu acted beyond their statutory and constitutional powers and the report and recommendations are *ultra vires* and potentially illegal. Unless the court intervenes the entire board of directors including the 1st and 2nd applicants are at risk of losing their employment.

In the Affidavit of Mark Lcharuni in support of the application and statement he avers that he is the managing director of the 3rd applicant, the 1st and 2nd applicants being directors therefrom. The 3rd applicant is a public company limited by guarantee; it is a water provider with an independent corporate existence and capacity to contract under its own name. The directors are drawn from various stakeholders representing country government, special groups, women, business community, residents and officers.

The 1st and 2nd applicants were appointed as directors by secondment by their respective stakeholder and the respondent, the County Assembly of Samburu had no role in the appointment.

In November, 2018 the respondent embarked on an investigation of the 3rd applicant in terms of shortage of water in the county and the management of human resource on the basis that it has an oversight role. Upon conclusion of the investigations there was a conclusion that a special audit be carried out by an independent auditor on both human and financial report, a new management board be constituted within 90 days and the new director who has to be appointed should not have political inclination. These recommendations are made in excess of the respondent's powers and against article 185(3) and (4) of the constitution, 2010.

In reply the respondent filed a Replying Affidavit sworn by Patrick Leshore the Clerk, Samburu County Assembly and the respondent and who avers that the respondent County has oversight authority over the county executive committee and any other executive organs and in such role passed a resolution which was adopted on 23rd October, 2018 to establish the Samburu County Assembly ad hoc committee on the Samburu Water and Sanitation Company with mandate to investigate the water shortage in the county, management of both human and financial resources allocated and collected by the company, the board functions and other connected matters. The ad hoc committee convened and heard views from various stakeholders including the applicants and upon completion made a report and recommendations and with findings that the board of the company is not involved in decision making of the company and its functions are affected by politics and most of its members are senior county officers and should therefore be reconstituted with appointment of new board members in 90 days.

The respondent has since adopted the resolution of the ad hoc committee recommendations on 21st November, 2018.

The orders sought by the applicants to stop the implementation of the report recommendations and to quash the decision taken by the respondent is premature and does not meet the threshold for judicial review for the reasons that no decision that impacts on the rights of the applicants has been made to warrant the invocation of the orders sought and the mere adoption of the report of the ad hoc committee followed engagement of the stakeholders and which may be adopted or rejected by the relevant decision-makers. There is no allegation of lack of due process as the ad hoc committee conducted hearings and the applicant did participate and where the recommendations are implemented the subject laws and instruments constituting the 3rd applicants shall be applied.

The respondent by recommending the constitution of a new board of the 3rd applicant is on the basis that water and sanitation is a function that the constitution confers upon county government and section 77(1) of the Water Act, 2016 requires every county government to establish water services providers which may be a public limited liability company under the Companies Act or other body providing water services as may be approved by the Regulatory Board. In discharging its constructional mandate, the respondent incorporated the 3rd applicant which is wholly owned by the Samburu County government and its assets are held on behalf of the public and the 3rd applicant has a public duty to hold any asset for and on behalf of the public. Even though incorporated as an independent legal person, the 3rd applicant is an agent and instrument of the Samburu County Government. The respondent has therefore not acted *ultra vires* its powers.

The applicants have therefore not demonstrated why the judicial review orders sought should issue against the respondent.

Determination

The twin issues which the applicants seek and which the court should address are whether the respondent should be prohibited from implementing its recommendations comprised in its *Special Report on Samburu Water and Sanitation Company* report and whether the decision in the report requiring the reconstitution of the 3rd respondent board should be quashed.

The gist of the application by the applicants is that the respondent acted *ultra vires* in its recommendations that the 3rd respondent board should be reconstituted in 90 days and which decision is alleged to relate to an independent entity and 3rd respondent which is incorporated under the Companies Act as a corporate and has legal capacity to enter into contracts. The orders sought are also meant to address the apprehension of the applicants with regard to their employment contracts which shall be terminated within 90 days upon the reconstitution of the 3rd respondent board following the implementation of the recommendations of the ad hoc committee of the respondent.

The respondent reply is that under articles 176 and 185 of the constitution, 2010 and section 77 of the Water Act, water and sanitation is a devolved function, the 3rd respondent was incorporated and constituted to offer the service of water and sanitation as an entity of the respondent and thus there is proper authority to issue report and recommendations in its reconstitution. The ad hoc committee constituted by the respondent sourced for view and heard all the stakeholders and the applicants were involved. The orders sought are premature and should not issue.

When should an order of prohibition be issued by the court?

In the case of **Kenya National Examination Council versus Republic ex part Geoffrey Gathenji Njoroge & 9 other [1997] eKLR**, the

Court stated the grounds upon which such an order may issue as follows;

What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, and Vol.1 at pg. 37 paragraphs 128

Similarly, the court in addressing whether the order of prohibition should issue in the case of **Kuria & others versus AG [2002] 2 KLR 69**, where the High Court held:

It does not matter whether the decision has been made or not, what matters is the objectives for which the court procedures are being utilized. Once it is decided that the process is an abuse, it matters not that it has been commenced or whether there was acquiescence by all parties. The duty of the court in such instances is to purge itself of such proceedings. Thus whereas the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued prosecution be stayed. An order of prohibition can be issued to prohibit the continued hearing. ...

An order of prohibition should be granted where there is an abuse of the process of the court, which will have the effect of stopping the prosecution already commenced. A prerogative order is an order of a serious nature and cannot and should not be granted lightly. There should be concrete grounds for supposing that continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest could be best served by the staying of the prosecution

Did the respondent therefore have power to recommend and or take and adopt the decision to reconstitute the 3rd applicant?

Both parties agree that the 3rd applicant is a body corporate registered under the Companies Act with its Article of Association and thus has a legal existence of its own. This fact is acknowledged by the respondent in the Paragraph 11 (d) of the Replying Affidavit by Patrick Leshore.

It is also common cause that the respondent has oversight authority over county organs. Water and sanitation is a devolved function and under which the interested party has power to direct.

However conscious and aware of the functions and authority bestowed upon the respondent and interested party by the constitution, 2010 under articles 176 and 185 and read together with section 77 of the Water Act, in addressing the water and sanitation resource of the interested party county, there was established a public limited liability company, the 3rd applicant. The entity was registered under the Companies Act with its articles of association.

Such registration gave the 3rd respondent a corporate status under its own name to run its affairs with directors comprising person, officers and various stakeholders within the interested party county. Such corporate persona of the 3rd applicant under the Articles of association has a mandate to run the affairs of the entity. The respondent and interested party are represented under the entity of 3rd applicant. By such representation, the interests of other stakeholders resident within the interested party county are addressed. With the 3rd applicant thus addressed, there is no reversion to the respondent in terms of corporate management.

The 3rd applicant as a legal persona should run its affairs in terms of resource management, financial and human. Where an audit of such resources are required, become necessary, are found justified, the articles of association refers. The directors who includes representatives from the respondent and interested party have a say.

The mandate of the 3rd applicant directors should not be circumvented by a resolution of the respondent. To do so is to act *ultra vires*. The order of prohibition is thus justified.

Well aware of its mandate, the respondent acted beyond the same. The affairs of the 3rd applicant have been put under its corporate status with directors to address.

The rationale for the issuance of the orders of prohibition in judicial review proceedings is given by the Court of Appeal in the case of **Director of Public Prosecutions versus Martin Maina & 4 Others [2017] eKLR** as follows;

Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it; it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.

Where the respondent may have had reason(s) to address the issue of water and sanitation resource within the interested party county, to remove the matter to the assembly and recommend reconstitution of the 3rd applicant in 90 days without taking cognisance of the powers bestowed on the respondent to act without power.

Such decision is hereby quashed.

In the premises, I find merit in the Notice of Motion dated 7th February, 2019 and I grant the following orders;

1. An order of prohibition do issue directed at the respondent, the County Assembly of Samburu and the Interested party, The County Government of Samburu in respect of the implementation of the report and recommendations to reconstitute the 3rd respondent board as recommended and adopted from the *Special Report on Samburu Water and Sanitation Company Report*;

2. Such decision by the respondent (1) above is hereby quashed; and

3. Each party shall bear own costs.

Delivered at Nakuru this 25th day of April, 2019.

M. MBARU JUDGE

In the presence of: