



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

JUDICIAL REVIEW MISC. APPLICATION NO. 5 OF 2018

(Before Hon. Justice Mathews N. Nduma)

IN THE MATTER OF AN APPLICATION BY SIAYA COUNTY PUBLIC SERVICE BOARD FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF AND/OR THE VIOLATION OF ARTICLES 10, 23, 24, 27, 48, 48, 50, 232, 235, 236 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF COUNTY GOVERNMENT ACT

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORMS ACT.

CHAPTER 26, LAWS OF KENYA

AND

IN THE MATTER: ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLICAPPLICANT

AND

COUNTY ASSEMBLY OF SIAYA COUNTY1ST RESPONDENT

SECTORAL COMMITTEE ON GOVERNANCE AND

ADMINISTRATION OF SIAYA COUNTY ASSEMBLY.....2ND RESPONDENT

SIAYA COUNTY PUBLIC SERVICE BOARDEX-PARTE APPLICANT

J U D G M E N T

1. The Exparte Applicant by a Notice of Motion dated 7th March, 2018 prays for orders of Judicial Review as follows:-

- a. An order of Certiorari to quash the report of the County Assembly of Siaya Committee on Governance and Administration titled "Report on the Petitions for dismissal of the Chairman of the County Public Service Board and Illegal Recruitment of Officers into the County Public Service."

b. Such other Orders and reliefs as the Honourable Court may deem appropriate in the circumstances.

c. Costs of the proceedings.

2. The Respondent conducted an enquiry into the conduct of the Ex-parte, Applicant based on Petitions of Members of the Public tabled in the County Assembly of Siaya.

3. The Ex-parte Applicant states that its Chairman was not given a fair hearing in violation of Article 50(1) of the constitution. The Applicant relied on the decision in the case of **Sceneries Limited v National Land Commission [2017] eKLR** in which the Principles of Natural Justice were described thus:-

“Natural Justice’ is an expression of English common law. In Local Government Board v Arlidge, Viscount Haldane observed, “...those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice.” As early as 1906, the Judicial Committee observed that the principle should apply to every tribunal having authority to adjudicate upon matters involving civil consequences.

Reliance is also made on the court of Appeal decision in **Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR** and **Onyango Oloo v Attorney General [1986-1989] EA 456**.

4. The Applicant states that persons who were to be adversely affected by the decision by the Respondent were not given an opportunity to be heard. The Applicant relies on assertions in the affidavit by Dave Anyona in this respect. He deponed that decision was taken before he was given opportunity to be heard despite earlier promises that he would be summoned to appear for a hearing.

5. The Respondents also purport to remove certain officers of the County Government of Siaya who were hired by the Ex-parte Applicant from employment without according such officers an opportunity to be heard. The said persons were not even made aware that there were proceedings against them before the County Assembly in which their removal from office was the subject.

6. The Ex-parte Applicant relied on the decision of the court of Appeal in the case of **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR** where the Learned Judges stated as follows:-

Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to “notice and hearing.” That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary. In the epigram of the indomitable Lord Denning in Kanda v. Government of Malaya

“If the right to be heard is to be a real right which is worthy 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.” (emphasis added)

7. Furthermore the ex-parte Applicant relies on Article 47 of the Constitution which provides:-

“1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

2. If a right or fundamental freedom has been or is likely to be adversely affected by the administrative action, the person has the right to be given written reasons for the action.”

The Fair Administrative Actions Act, 2015 has given further effect to the provision under section 4.

8. In addition, the Ex-parte Applicants have submitted that the Respondents acted in excess of their powers in issuing the impugned report. That Article 176 of the constitution establishes the 1st Respondent and its powers are set out under Article 183 and 185 of the Constitution. The County Government Act Section 88 further elaborates the Legislative powers of the 1st Respondent. Further the Assemblies are guided by the standing orders.

9. In the Report, the Assembly concluded that the appointment of members of staff made by Ex-parte Applicant vide various letters dated 2nd February, 2017, 31st August 2017, and 18th October, 2017 be nullified with immediate effect. The result was summary dismissal of affected staff members. The power the 1st Respondent purported to exercise vests in the public service board and not the County Assembly. The Assembly therefore acted ultra vires its mandate in violation of the statutes and the constitution.

10. Furthermore, section 9 of the County Governments Act, provides that a member of the County Assembly shall not be directly or indirectly involved in the executive functions of the County Government and its administration.

11. The Court of Appeal while examining whether a County Assembly has powers to suspend a County Assembly Service Board in the case

of County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others (supra) had this to say –

“The next issue we wish to consider is whether or not a County Assembly has powers to suspend a County Assembly Service Board. Having considered the rival submissions on this issue, we agree with counsel for the Respondents that County Assembly Service Boards do not exist at the pleasure of County Assemblies or any other State organ. County Assembly Service Boards are autonomous state corporations established under Section 12 of the County Governments Act. Although, as is clear from Section 12(7) of the County Governments Act, they are established to provide services and facilities for the efficient and effective functioning of County Assemblies, they are not subordinate to County Assemblies or any other State organ. County assemblies have no constitutional or statutory authority to disband, dissolve or even suspend the operations of County Assembly Service Boards.”

12. The Ex-parte Applicant prays that the Application be granted with costs.

Response

13. The main argument by the 1st Respondent is that it acted pursuant to two petitions dated 21st November, 2017 and 4th November, 2017 made by Members of the Public to the Assembly.

14. That the Assembly followed the relevant constitutional and statutory provisions including the standing orders.

15. That the Assembly wrote to the County Secretary a letter dated 18th December, 2017 requesting for the relevant documents to enable it investigate the matter. That the Ex-parte Applicant did not supply any documents but challenged the 1st Respondent to deal with the petitions.

16. That by a letter dated 18th January, 2018, 1st Respondent invited the Ex-parte Applicant and the County Secretary to appear before the 2nd Respondent on 29th January, 2018 to shed light on issues raised in the Petition.

17. The proceedings of the committee from 8th December, 2018 to 29th January, 2018 show the process was conducted in a transparent manner.

18. The Respondents submit that they acted lawfully, fairly and did not exceed their mandate. They rely on the case of **Republic v Chief Magistrate Commercial Court & 2 others ex-parte Violet Ndanu Mutinda & 5 others [2014] eKLR** in which the court stated:-

“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.”

19. Furthermore, the Respondent’s submit that the ex-parte Applicant being an organ of Government has no capacity to file suit stating that the rights of the ex-parte Applicant have been infringed as in the present case where the ex-parte Applicant alleges Articles 10, 23, 24, 27, 48, 50, 232, 236 and 236 of the constitution have been violated. Among these rights are part of the Bill of Rights. The County Public Service Board is not a natural person and does not enjoy rights under the Bill of Rights be they horizontal or vertical applications of Bill of Rights recognized in Article 20(1) of the constitution. The Respondent relies on the case of **Kenya Buss Service and another v Minister of Transport and 2 others (2012) eKLR** for the submissions. It was held in this case that state organs are not entitled to the protection of the Bill of Rights and cannot therefore claim a violation of rights and fundamental freedoms. This was affirmed by Majanja J. in the case of **Speaker, Nakuru County Assembly & 46 others v Commission of Revenue Allocation & 3 others [2015] eKLR**, the Respondent submits.

20. Furthermore, it is submitted for the Respondents that Article 185(1) of the constitution confers legalization and oversight, authority of the counties in County Assemblies. Section 15 of County Government Act enables any person to petition the County Assembly to consider an issue within its mandate.

21. It is submitted that the Assembly acted within its jurisdiction; provided a hearing to the petitioner and followed due process in arriving at its decision. The Respondent submits therefore the Respondents did not violate Article 47(1) and 50(2) of the constitution. The Petitions were lodged by M/s. Jane Adhiambo Olingo, Mr. Emmanuel K. Otieno, Mr. George Otieno Obare and Mr. Cleophas Ochola. The Petitioners clearly knew who their accusers were. Petitions were considered by Committee on governance and administration per provisions of standing order no. 211(1). The petitioners sought inter alia removal of the Chairman of the Public Service Board.

22. Petitions were tabled at a meeting held on 8th December, 2017, 11th December, 2017, 15th December, 2017. The committee considered reports of the Public Service Board on recruitment. 4th meeting was held on 29th January, 2018 in which committee interrogated members of the ex-parte Applicant and the County Secretary after which the committee retreated to prepare and adopt report.

23. The ex-parte applicant and County Secretary were invited to appear before the committee on 29th January, 2018 to respond to accusations leveled against them. The representative of ex-parte Applicant Mr. Anyona appeared and challenged authority of the Assembly to deal with petitions.

24. Respondent concluding that fair hearing and due process was followed. The Respondents pray that the petition be dismissed with costs.

Determination

25. The issues for determination are:-

- (i) Whether the 1st Respondent followed due process, acted within its mandate and gave the Exparte Applicant a fair hearing before taking the adverse decision against the chairman and members of the ex-parte applicant and employees that had been recruited by the ex-parte applicant.
- (ii) Whether the ex-parte applicant is entitled to the remedies sought against the Respondents.

Issue 1

26. The Assembly made various recommendations including –

- (i) The appointing authority to institute disciplinary procedures against the County Secretary, Chairperson and Secretary of the Board and that all appointments done as a result of the suitability process that was found by the committee to have been flawed, illegal discriminatory be nullified with immediate effect. The Assembly does no more than recommend. It is for the appointing authority to make decisions on the matter. In case of Speaker, **Nakuru County Assembly & 46 others v Commission on Revenue allocation & 3 others [2015] eKLR**, the court held that these recommendations are not binding. These are not decisions amenable to judicial review. It was held that the recommendations are not decisions to be quashed. The court agrees with the reasoning by the Learned Judge in the case

27. Furthermore, the court is of the considered view that due process was followed in interrogating the conduct by the ex-parte Applicant and its members. Furthermore, the 2nd Respondent gave the members of the ex-parte applicant a fair hearing before making recommendations to the 1st Respondent in plenary where the impugned recommendations were made.

28. Furthermore the court accepts and adopts the reasoning in **Simon Wachira Kagin Case v County Assembly of Nyeri & 2 others [2013] eKLR** where it was held –

“The only possible scenario in which the court may be prepared to interfere with the proceedings and decisions of the County assembly and indeed is in extreme situations when these bodies act or conduct their proceedings in a manner that amounts to abrogation of the constitution.”

29. This is a prudent approach in paying reverence to the venerable doctrine of separation of powers. The court must be slow therefore to usurp the powers of other constitutional organs and less so, be tempted to substitute its decisions for those made by the various state organs. The power of review by the court, under Articles 165(3) (a) of the constitution ought only to be exercised to arrest apparent manifestations of injustice by state organs where they’ve acted ultra vires the constitution and founding statutes violated rules of natural justice and in cases of blatant violation of due process guided by the Governing statutes, Regulations or in case of an assembly standing orders. The Petitioners have not established such a case on a balance of probabilities to warrant the court to interfere with the recommendations made by the 1st and 2nd Respondent.

30. Furthermore, the Ex-parte Applicant being a state organ is not a natural person capable of alleging violation of its rights and fundamental freedoms vide a petition under Article 22 of the constitution of Kenya 2010.

31. Therefore, in answer to issue ii above the court finds that the ex-parte Applicant is not entitled to the remedies sought it being a state organs. Instead, the persons recruited by the ex-parte Applicant who are likely to be affected by adverse decision by the appointing authorities following recommendations by the 1st and 2nd Respondent are the appropriate persons to commence Judicial Review Proceedings against the appointing authorities once those adverse decisions have been made following the recommendations by the County Assembly. An order of certiorari ought not to issue to quash a report whose contents are mere recommendations for disciplinary action against the chairman of the County Public Service Board and other officers recruited by the County Public Service Board.

32. Accordingly, the application lacks merit and is dismissed with no order as to costs since the ex-parte Applicant is part and parcel of the County Government of Siaya, which is also the case with 1st and 2nd Respondents.

Judgment Dated, Signed and Delivered in Kisumu this 20th day of December, 2018

Mathews N. Nduma

Judge

Appearances

Mr. Otieno Willis for the ex-parte Applicant

Mr. Ogola for Respondent

