



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 422 of 2012

REPUBLICAPPLICANT

VERSUS

CITY COUNCIL OF NAIROBI.....RESPONDENT

NICHOLAS OKUMU LUBONDI.....INTERESTED PARTY

EX-PARTE

FRANCIS KIMANI MWAURA

EPHANTUS GITONGA

JAMES NJUGUNA

SAMSON WAMBUGU NGENGI

RULING

Francis Kimani Mwaura, Ephantus Gitonga, James Njuguna and Samson Wambugu Ngenji (the 1st to 4th ex-parte applicants respectively) are through the chamber summons application dated 26th November, 2012 seeking the leave of this Court to commence judicial review proceedings. If the leave is granted, they will seek orders of certiorari, prohibition and mandamus in respect of a certain decision made by the City Council of Nairobi (the Respondent). Due to the nature of the orders which the applicants seek, they have named Nicholas Okumu Lubondi as an Interested Party. The applicants also pray that the said leave ***“do forthwith operate to suspend the implementation of the decision of the City Council of Nairobi appointing Nicholas Okumu Lubondi as the Assistant City Engineer (Electrical) and/or to suspend the discharge of functions of Assistant City Engineer (Electrical) by Nicholas Okumu Lubondi.”***

The application is supported by the verifying affidavit of the 1st Applicant sworn on 16th November, 2012, a supplementary affidavit sworn by the same deponent on 10th December, 2012 plus annexures thereto. It is further supported by the grounds on its face *inter alia*; that the Interested Party is not an engineer and his appointment is unlawful and unreasonable for offending the provisions of the Engineers Act, Act No. 43 of 2011. Further that his appointment denied the applicants the opportunity to be appointed to the position thereby denting their legitimate expectation. They submit that the High Court has jurisdiction both under the Law Reform Act and in its original jurisdiction to prevent abuse of power.

The Respondent opposed the application by way of grounds of opposition dated 10th December, 2012 namely:

1. The Application does not disclose any cause of action to warrant intervention of this Honourable Court as there is no infringement of any of the Applicants' rights.

2. That the Application as drawn and filed is frivolous, vexatious and an abuse of the Court process as there is no evidence tendered to invoke reasonable expectation.

3. The Applicants have not shown how the Respondent has exercised powers which it did not have and what prejudice the Applicants have suffered.

4. The Applicants have not proved in any way any procedural impropriety against the Respondent when the decision was made.

5. The Application as drawn and filed lacks merit and should be dismissed with costs.

On his part the Interested Party opposed the application by way of a replying affidavit which he swore on 10th December, 2012. It is the Interested Party's case that this application lacks merit in that it seeks to challenge the merits of the decision of the Respondent and not the process through which the decision was reached. The Interested Party also avers that he has the necessary qualifications to hold the position in question. It is his view that the position is a managerial one and he has a Master of Business Administration [Executive] degree from Moi University which entitles him to hold the said position. It is his view that the applicants are envious of his success. The Interested Party contends that he and the Respondent had not breached any law.

The 1st prayer of the application is spent since this matter was certified urgent on the day it first came to court. Initially, I thought that the matter that would engage the Court was whether leave would operate as stay of the appointment of the Interested Party to act as Assistant City Engineer (Electrical). However, when the application was canvassed before me on 13th December, 2012, it became apparent that the Respondent and the Interested Party were opposing the grant of leave on a point of law. I will therefore have to deal with this particular issue first.

Counsel for the Respondent and Interested Party submitted that the appointment of the Interested Party to the post of Assistant City Engineer, in an acting capacity, was effected through the letter dated 8th April, 2010 and the application having been filed on 26th November, 2012 breaches Order 53 Rule 2 of the Civil Procedure Rules, 2010 which provides that an application for an order of certiorari must be filed within six months from the date of the act complained of. It will do no harm to reproduce the said Rule which provides as hereunder:

“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 its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may 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.”

The applicants hold the view that they are not in breach of the said Rule since the decision they want quashed is the one contained in the letter dated 31st October, 2012 in which the Town Clerk Mr. P. T. Odongo reaffirmed the appointment of the Interested Party as per the letter dated 8th April, 2010. This letter was necessitated by the fact that the City Engineer had through a letter dated 2nd October, 2012 appointed the 1st Applicant to act as Assistant City Engineer (Electrical) in place of the Interested Party.

The question then is: What is the date of the decision which the applicants seek to quash? There are three positions that one can take on this issue. The first is to agree with the Respondent and the Interested Party that the decision in question was conveyed through the letter dated 8th April, 2010. The second position is that taken by the applicants to the effect that the decision being challenged is contained in the letter dated 31st October, 2012. The third view is to hold that although the letter containing the decision is dated 8th April, 2012, an alleged breach of the law continues as long as the Interested Party remains in that office. I do not find it necessary to tackle the third view-point in this decision because it is not hard to determine,

from the proceedings herein, the date of the decision the applicants seek to have quashed. It is apparent from the letter of the City Engineer dated 2nd October, 2012 that the Interested Party had been removed from office. There was an argument that the City Engineer had no capacity to write that letter. In my view that is not an argument for this stage of these proceedings. After the Interested Party had been removed from office he was reinstated back to the same office through the letter dated 31st October, 2012 when the Town Clerk reaffirmed the contents of the letter dated 8th April, 2010. One must agree with the applicants that it is the decision contained in the letter of 31st October, 2012 which is being challenged. The applicants have therefore brought their application within the time prescribed by the law.

Leave, however, must not be granted as a matter of course. An applicant must establish that he has an arguable case. Once a prima facie case is established then leave should be granted. In my view the applicants before this Court have established that they have an arguable case. Leave is therefore granted to the ex-parte applicants to commence judicial review proceedings in the terms of their chamber summons application. Other directions will issue at the end of this ruling.

The remaining issue is whether the said leave should operate as stay. I did direct the applicants to serve the application for inter-partes hearing since I knew that a grant of stay would have unpleasant repercussions on the Interested Party and I found it necessary to hear him and the Respondent before making any decision. From the outset it is clear that the prelude to these proceedings is the fight between the Town Clerk and the City Engineer. It is not the business of this Court to direct a public body to promote employee X instead of employee Y. That is the prerogative of the employer. These proceedings are therefore not about fights at City Hall.

The applicants have put forward one pertinent question: Does the Interested Party have the necessary qualifications required by the law and the regulations of the Respondent to hold the post of Assistant City Engineer (Electrical)? They have produced evidence to show that the Interested Party does not have the qualifications for the office in question. It is their argument that the Respondent being a public body must adhere to the rule of law in its operations. The question as to whether the Interested Party has the necessary qualification can only be answered after the hearing of the substantive application. It is not proper at this stage to comment on the strength or weaknesses of the arguments of the parties. The only question that the Court needs to answer at the moment is whether the evidence placed before the Court is sufficient to warrant the granting of a stay.

I will start by pointing out that the jurisdiction to issue stay is inherent in the court. It is meant to safeguard the interests of justice by ensuring that matters complained of are kept in abeyance pending determination of the judicial review application. Thus the courts are out to ensure that an applicant does not suffer irreparable harm in the eventuality that that he or she succeeds. It is to avoid a situation where the success of an applicant will be rendered a Pyrrhic victory. One of the reasons for granting stay is that an applicant must demonstrate that he/she has an arguable case and that if stay is not granted he/she will suffer loss.

The applicants on the face of it have nothing to lose were the Interested Party to remain in office. There is no guarantee that anyone of them will occupy that office if the Interested Party is removed. If this was the only consideration, then this Court will not have any reason to grant stay. There are however other considerations in respect to this case. The applicants have pointed out that the continued occupation of the office in question by the Interested Party is an affront to the rule of law. From what they have placed before the Court, one can say they have a strong argument. The Court cannot close its eyes whenever it is alerted about the likelihood of an on-going breach of the law. This is one case in which the grant of leave should operate as stay. As such, I order that the grant of leave shall operate as stay in terms of the 5th prayer of the application. The consequence is that the Interested Party shall vacate the office of the Assistant City Engineer (Electrical) with effect from the date of this ruling. I note that this order has great impact on the Interested Party and orders must be issued to protect his interests. In this regard, I direct that the said office of

the Assistant City Engineer (Electrical) shall remain vacant pending the hearing and determination of

these proceedings. If the fact of the office remaining vacant will hamper the operations of the Respondent, then I direct that the Respondent be at liberty to appoint anybody else apart from the applicants and the Interested Party to occupy the office in an acting capacity awaiting the outcome of these proceedings. Directions will be given so that this matter can be heard on priority basis. The costs of this application will be in the cause.

Dated and signed at Nairobi this 18th day of December, 2012

W. K. KORIR,
JUDGE OF THE HIGH COURT