Republic v Attorney General & 16 others; Kimeu & 242 others (Interested Party); Musyoki (Exparte) (Judicial Review Application E007 of 2021) [2022] KEHC 12511 (KLR) (26 May 2022) (Ruling)

Neutral citation: [2022] KEHC 12511 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

JUDICIAL REVIEW APPLICATION E007 OF 2021

GV ODUNGA, J

MAY 26, 2022

IN THE MATTER OF AN APPLICATION BY NICHOLAS KIMULI MUSYOKI FOR JUDICIAL REVIEW ORDER OF CERTIORARI

AND

IN THE MATTER OF ARTICLES 10 & 232 OF THE CONSTITUTION

AND

IN THE MATTER OF THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT, NO. 1A OF 2015

AND

IN THE MATTER OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF ILLEGAL AND UNCONSTITUTIONAL APPOINTMENTS OF THE INTERESTED PARTIES BY THE RESPONDENTS AS MEMBERS AND CHAIRPERSONS OF VARIOUS BOARDS OF STATE CORPORATIONS

BETWEEN

REPUBLIC .... APPLICANT

AND

ATTORNEY GENERAL & 16 OTHERS .... RESPONDENT

AND

DOROTHY KIMEU & 242 OTHERS .... INTERESTED PARTY

AND

NICHOLAS KIMULI MUSYOKI .... EXPARTE

RULING

1. By a Motion on Notice dated October 13, 2021, the *ex parte* applicant herein, Nicholas Kimuli Musyoki, seeks the following orders from this court:

   a) An order of Certiorarito bring into this Court and quash the Entire Special Issue of the Kenya Gazette Dated October 8, 2021, Vol. CXXIII-No. 208 containing Gazette Notices Nos. 10589-10594, 10596-10605, 10607-10645, 10647-10714 and 10716-10722 appointing the 1st-235th Interested Parties to the Boards of Various State Corporations.

   b) That cost of this application is provided for.

2. The said application was grounded on the following:-

   1. That on October 8, 2021the Respondents did by way of Special Issue of the Kenya Gazette, Vol. CXXIII-No. 208 appoint the Interested Parties through Gazette Notices Nos. 10589-10594, 10596-10605, 10607-10645, 10647-10714 and 10716-10722 as either Chairpersons or members of The Boards of various State Corporations.

   2. That the appointments were undertaken contrary to the national values and principles of governance espoused at Article 10 of the *Constitution* and are therefore unconstitutional.

   3. That the appointments were made contrary to the values and principles of public service that binds the Respondents and all State Corporations set out at Article 232 of the *Constitution* and the *Public Service (Values and Principles) Act*, No. 1A of 2015 and are therefore unconstitutional and illegal.

   4. That the appointments were made without any advertisement being placed to invite all eligible Kenyans to apply and consequently the appointments suffer from the heavy burden of lack of transparency and participation of the people.

   5. That the appointments were made without subjecting the Interested Parties to any interviews and therefore the said appointments fail the Constitutional and statutory validity test of fair competition and merit as the basis of appointments.

6. That the appointments were made without any accountability to the people of Kenya who have a right to know that vacancies exist and the qualifications and criteria for filling those vacancies in an open and democratic system.

7. That the appointments have been made in total disregard of the innumerable judgments and orders of this Court that have given effect to the provisions of Article 10 and 232 of the *Constitution* on, *inter alia*, fair competition in appointments and consequently the appointments are irrational, unreasonable, illegal and unconstitutional for disregarding Court orders and clear judicial decisions and pronouncements.

8. That the appointments are a manifestation of Executive impunity that disregards the rule of law and Constitutionalism as the Superior Courts have, times without number, made decisions against the Respondents and which decisions are clear that the Respondents must observe the requirements of Articles 10 & 232 of the *Constitution* on appointments.

9. That the Respondents have failed to observe the value and principle of public service that requires high standards of professional ethics in that: -

   (a) The Respondents have failed to observe the rule of law that has been set out very clear by unambiguous and several decisions of this Court and other Superior Courts on appointments to public offices.

   (b) Failed to be transparent in the making of the impugned appointments of the Interested Parties.

10. Failed to be accountable for their actions of making appointments that are contrary to very clear judicial decisions.

11. That the Respondents, in failing to advertise for the vacancies in the State Corporations to which they have purported to appoint the Interested Parties, have discriminated against other Kenyans who are eligible or who would have in one way or another participated in the proposed appointments.

12. That violation of the *Constitution* or any statute as is evidence here is a matter that has a huge public interest as it goes to the rule of law that is the cornerstone of the existence of this Republic.

13. That due to the repeated and obvious predilection of the Respondents in acting outside the *Constitution* and Statutes in making appointments to State Corporations and the clear disregard of the several judgements of this Court and other Superior Courts, this is an apt case and moment for this Court to immediately stay the impugned appointments for good order.

14. That the rule of law and Constitutionalism that are at the core of public interest, as it is in the public interest to observe the rule of law, is threatened with erosion and this Court is the last shield to ensure a return to the rule of law and Constitutionalism.

15. That the appointments are unconstitutional, illegal, irrational, unreasonable and irregular and are only liable to be quashed by this Court.

16. That unless restrained immediately, times without number, over and over again and repeatedly by this Court, the Respondent's impunity in violating the *Constitution* and Statute in making appointments to public offices will continue and only get worse.

17. That it is in the interest of justice, the rule of law, clarity to the public and public interest that this application be heard and determined expeditiously.

3. In his affidavit sworn in support of the application, the ex parte applicant deposed that on October 8, 2021the Respondents did by way of Special Issue of the Kenya Gazette, Vol. CXXIII-No. 208 appoint the Interested Parties through Gazette Notices Nos. 10589-10594, 10596-10605, 10607-10645, 10647-10714 and 10716-10722 as either Chairpersons or members of the Boards of various State Corporations. The said appointments, it was averred, were undertaken contrary to the national values and principles of governance espoused at Article 10 of the *Constitution* and are therefore unconstitutional. To the applicant, the said appointments, were made contrary to the values and principles of public service that binds the Respondents and all State Corporations set out at Article 232 of the *Constitution* and the *Public Service (Values and Principles) Act*, No. 1A of 2015 and are therefore unconstitutional and illegal.

4. It was contended that the appointments were made without any advertisement being placed to invite all eligible Kenyans to apply and consequently the appointments suffer from the heavy burden of lack of transparency and participation of the people. It was the applicant's averment that the appointments were made without subjecting the Interested Parties to any interviews and therefore they fail the Constitutional and statutory validity test of fair competition and merit as the basis of appointments. In addition, the appointments were made without any accountability to the people of Kenya who have a right to know that vacancies exist and the qualifications and criteria for filling those vacancies in an open and democratic system.

5. It was deposed that the appointments have been made in total disregard of the innumerable judgments and orders of this Court that have given effect to the provisions of Article 10 and 232 of the *Constitution* on, *inter alia*, fair competition in appointments and consequently the appointments are irrational, unreasonable, illegal and unconstitutional for disregarding Court orders and clear judicial decisions and pronouncements. According to the applicant, the appointments are a manifestation of Executive impunity that disregards the rule of law and Constitutionalism as the Superior Courts have, times without number, made decisions against the Respondents and which decisions are clear that the Respondents must observe the requirements of Articles 10 & 232 of the *Constitution* on appointments.

6. The applicant averred that the Respondents have failed to observe the value and principle of public service that requires high standards of professional ethics in that: -

   (a) The Respondents have failed to observe the rule of law that has been set out very clear by unambiguous and several decisions of this Court and other Superior Courts on appointments to public offices.

   (b) The Respondents have failed to be transparent in the making of the impugned appointments of the Interested Parties.

   c) The Respondents have failed to be accountable for their actions of making appointments that are contrary to very clear judicial decisions.

7. The Respondents were accused of in failing to advertise for the vacancies in the State Corporations to which they have purported to appoint the Interested Parties, have discriminated against other Kenyans who are eligible or who would have in one way or another participated in the proposed appointments.

8. To the applicant, violation of the *Constitution* or any statute as is evidence here is a matter that has a huge public interest as it goes to the rule of law that is the cornerstone of the existence of this Republic. However, due to the repeated and obvious predilection of the Respondents in acting outside the

Constitution and Statutes in making appointments to State Corporations and the clear disregard of the several judgements of this Court and other Superior Courts such as Petition No. 236 of 2018 (*Katiba Institute & Another v The Hon Attorney General & 129 Others*) delivered on May 27, 2021 wherein this Court quashed a series of appointments made in similar fashion as this one. This case among others by various Superior Courts did reiterate that any appointment that violate the provisions of Articles 10 and 232 of the *Constitution* is for quashing.

9. To demonstrate the impunity of the Respondents, the applicant pointed out the fact that the Respondents proceeded, less than five (5) months later to make similar appointments in the instant impugned Kenya Gazette and also proceeded to re-appoint individuals whose appointment were the subject of Petition No. 236 of 2018 aforesaid and picked out the following individuals as those whose previous appointments appeared in the previous quashed Gazette Notice and who appear in the instant impugned Gazette Notice as: -

    i. The 19th Interested Party herein, Gichira Kibaara.

    ii. The 53rd Interested Party herein, Miriam Gaituri.

    iii. The 71st Interested Party herein, Stephen Gichohi Gichuhi.

    iv. The 72nd Interested Party herein, Conrad Thorpe.

    v. The 90th Interested Party herein, Dr. Freshia Mugo Waweru.

    vi. The 123rd Interested Party herein, Jean Njiru.

    vii. The 159th Interested Party herein, Carole Ayugi.

    viii. The 176th Interested Party herein, Dr. Nelly Yatich.

    ix. The 177th Interested Party herein, Kamau Kuria.

    x. The 211th Interested Party herein, Gen (rtd) Julius Waweru Karangi.

10. The applicant asserted that the rule of law and Constitutionalism that are at the core of public interest, as it is in the public interest to observe the rule of law, is threatened with erosion and this Court is the last shield to ensure a return to the rule of law and Constitutionalism and maintained that the appointments are unconstitutional, illegal, irrational, unreasonable and irregular and are only liable to be quashed by this Court. To him, unless restrained immediately, times without number, over and over again and repeatedly by this Court, the Respondent's impunity in violating the Constitution and Statute in making appointments to public offices will continue and only get worse. It was the applicant's position that it is in the public interest that the rule of law and constitutionalism be observed and respected at all times.

11. On the other hand the 1st Respondent by a Motion on Notice dated October 27, 2021, expressed to be brought pursuant to Section 3A of the *Civil Procedure Act*, Order 42, Rule 6 (1) & (2) of the *Civil Procedure Rules*, 2010, the inherent powers of the Court and pursuant to the directions of the Court given on the 19th October, 2021 sought an order staying these proceedings pending the hearing and determination of Nairobi Civil Appeal No. 415 of 2021 - *Attorney-General vs Katiba Institute and 130 others*. They also sought provision for costs.

12. The said application was based on the grounds:

    a) That the Honourable Court has the jurisdiction to issue the orders sought;

b) That the decision of the Court of Appeal in Nairobi Civil Appeal No. 415 of 2021 - *Attorney-General vs Katiba Institute and 130 others* will have a direct bearing on the present Judicial Review application;

c) That pursuant to the filing of Nairobi Civil Appeal No. 415 of 2021 - *Attorney-General vs Katiba Institute and 130 others* the Applicant successfully sought orders of stay of execution of the Judgment and orders of the High Court given in Nairobi High Court Constitutional Petition No. 236 of 2018 - *Katiba Institute and Africog vs. the Attorney-General and Public Service Commission* which is subject of appeal in Nairobi Civil Appeal No. 415 of 2021 - *Attorney-General vs Katiba Institute and 130 others*.

d) That the Court of Appeal has given directions towards an expedited hearing of the appeal;

e) That the application has been made timeously without delay.

f) That in the absence of board members the statutory corporations and parastatals will be severely impaired in their operations and consequently the public will suffer loss in provision of services.

g) That sound judicial policy supports the staying of the proceedings;

h) That there is sufficient cause for issuance of the orders of stay sought;

i) That the total sum of circumstances of the case merit issuance of the orders sought;

j) That the Honourable Court may issue the orders sought on terms;

13. The application was supported by an affidavit sworn by Charles Mutinda, a State Counsel in the office of the Attorney General. According to him, the ex-parte Applicant herein mainly seeks orders of this Honourable Court quashing the Entire Special Issue of Kenya Gazette dated 8th October 2021, vol. CXXIII-No. 208 containing Gazette Notices Nos. 10589-10594, 10596-10605, 10607-10645, 10647-10714 and 10716-10722 appointing the 1st-235th interested parties to the boards of various state corporations. The said application is premised on allegations that the appointments were made contrary to the national values and principles of governance under Article 10 of the *constitution*, the principles of public service set out under Article 232 of the *constitution*, the Public Service Act, that the same were made without advertisement, lacked public participation and transparency, the appointees were not subjected to interviews and the same was not subject to merit and fair competition and also that the same were contrary to judicial decisions including Nairobi Constitutional Petition No. 236 of 2018; *Katiba Institute & Another vs. the Hon. Attorney-General & 129 others*.

14. According to the deponent, the issues in the present application were substantially some of the same issues before the High Court in the said Nairobi Constitutional Petition No. 236 of 2018. Being aggrieved by the said decision the Applicant appealed therefrom to the Court of Appeal in Nairobi Civil Appeal No. 415 of 2021 - *Attorney-General vs Katiba Institute and 130 others* and sought a conservatory order suspending and staying execution of the judgment and decree of the High Court in Nairobi Constitutional Petition No. 236 of 2018 which orders were issued in Nairobi Civil Application E184 of 2021 - Attorney-General vs. Katiba Institute and others.

15. It was deposed that in the event that the Court of Appeal determines the appeal one way or the other the ratio decidendi thereon is binding upon this court and will directly affect the determination of the matters herein since the issues before the Court of Appeal and those currently before this Court are so inextricably intertwined that it would be appropriate in the circumstances for the Honourable Court to exercise deference to the Court of Appeal respecting the hierarchy of our courts over subject matter.

16. It was contended that the peculiar circumstances of this case; the substratum of the pending appeal before the Court of Appeal and the matters in issue before this court constitute sufficient cause for staying the proceedings herein pending the hearing and determination of Nairobi Civil Appeal No. 415 of 2021. According to the deponent, this Court acting even on its own motion has the jurisdiction to take judicial notice of the pending proceedings in the Court of Appeal and to grant the orders sought herein so as to preserve the good order in the dispensation of justice.

17. It was the deponent's view that it is in the interest of just, expedient, proportionate and affordable dispensing of justice that this Court stays the present proceedings awaiting the determination of the aforementioned appeal.

18. In his replying affidavit the *ex parte* applicant deposed that the application has been made in absolute bad faith and with a view to mislead this Court through peddling of falsehoods and concealment of material and relevant facts as follows: -

(i) That there is absence of board members in parastatals to which the impugned appointments have been challenged in these proceedings. The 1st Respondent has not disclosed which of those parastatals do not have board members.

(ii) The 1st Respondent has not disclosed to this Court by way of express reference to statutory provisions the membership of board of concerned parastatals and the quorum of the said boards to conduct meetings.

(iii) The 1st Respondent has failed to disclose that none of the parastatals to which appointments have been made lack existing board members and that indeed all of them have existing board members with sufficient quorum to transact.

(iv) The 1st Respondent has not, deliberately, disclosed to this Court which specific parastatals will lack quorum if the impugned appointments are stayed or quashed. Only quorum can affect the business of a corporate body in case of certain, and not all, decisions.

(v) The 1st Respondent has not told the Court the exact nature of the operations of the parastatals will be affected or impaired and which impairment can only, remotely, come from lack of quorum to transact crucial business.

(vi) The 1st Respondent has not disclosed to this Court the exact services to the public that will be impaired in the absence of members of any Board to which the impugned appointments have been made.

(vii) The 1st Respondent has failed to disclose to the Court that all the impugned appointments were partial appointments to boards and that there is no quorum hitch at all.

(viii) The 1st Respondent has failed to disclose to the Court that in any event all the directors whose appointments have been challenged are not full-time and attend meetings periodically and that none of them are involved in the day to day running or management of the parastatals.

(ix) The 1st Respondent has misled the Court that services to the public will be affected as the day to day management of parastatals are not by board members but by management staff.

x) The stay orders issued by the Court of Appeal have lapsed as the duration of the challenged appointments have lapsed.

19. To demonstrate the insincerity and dishonesty of the 1st respondent in making the instant application by premising it on, *inter alia*, quorum at board meetings and absence of board members the *ex parte*

applicant referred to the case of *Special Economic Zones Act*, No. 16 of 2015 to which the 1st & 214th Interested Parties have been appointed by way of Gazette Notices Nos. 10589 and 10708 respectively and stated as follows: -

(i) Section 12 of the *Special Economic Zones Act*, No. 16 of 2015 provides for 10 directors.

(ii) Section 13 of the *Special Economic Zones Act*, No. 16 of 2015 as read together with Paragraph 3(4) of the Second Schedule to the Act provide for a quorum as half of the total directors including the Chairperson or the person presiding hence the quorum is 5 members being half of 10.

(iii) Only two directors are affected in these proceedings and consequently there are 8 existing and serving directors of the Special Economic Zones Authority.

iv) The 1st Respondent is therefore deliberately lying to this Court that there is absence of members of boards in parastatals to which the impugned appointments are made that that the business of those parastatals can be impaired and services not delivered to the public.

20. It was deposed by the *ex parte* applicant that he has gone through all the Acts of Parliament to which the impugned appointments have been made and the provisions on board members and quorum as against the appointees and asserted that none of them have a quorum problem even if this Court were to stay the impugned appointments or quash the same. In a nutshell, there is no parastatal relevant to these proceedings where it can be said that there is absence of board members to transact business.

21. As regards the matter pending before the Court of Appeal it was averred that: -

(i) The pending appeal has no direct or indirect impact or influence on the instant proceedings as the Court of Appeal has not issued any specific order staying these proceedings.

(ii) That the Court of Appeal in the pending appeal did not suspend the provisions of Article 10 and 232 of the *Constitution* and consequently the 1st Respondent cannot violate or threaten to violate the same under the guise of a pending appeal.

(iii) The Court of Appeal in the pending appeal did not oust the jurisdiction of this Court to consider, entertain, hear and determine any violation or threat of violation of Articles 10 and 232 of the *Constitution*.

(iv) The Court of Appeal in the pending appeal did not give the green light to the 1st Respondent and indeed all other Respondents the green light to violate or threaten to violate or make appointments in the manner that is pending determination in the Court of Appeal.

22. According to the *ex parte* applicant, what is pending before the Court of Appeal has no relation or relevance to the proceedings herein as: -

(i) Before the Court of Appeal is a question of declaration of certain statutory provisions as unconstitutional which the Court of Appeal stayed. Nowhere in these proceedings is this Court being asked to declare the same provisions or any similar ones unconstitutional.

(ii) Before the Court of Appeal was a question, which was false and the Court of Appeal was misled by the 1st Respondent, of the parastatals not being able to transact business because of lack of quorum.

23. It was averred that the stay orders granted by the Court of Appeal were meant to ensure status quo of the challenged appointments and that all those appointments have since lapsed and consequently the stay orders of the Court of Appeal are inconsequential and no longer relevant.

24. To the *ex parte* applicant, the present proceedings are *sui generis* and that this Court has no jurisdiction to stay these proceedings as no such express or otherwise provision exist for stay of these proceedings unless a party obtains stay of proceedings in the Court of Appeal within the context of a live appeal. It was contended that since there is no appeal against the substantive orders of this Court that can be the basis even for the Court of Appeal to stay the proceedings herein, the instant application is bad in law and is for dismissal.

25. It was averred that this application is based on pure speculation that the decision of the Court of Appeal will be binding on this Court and this decision as in any event the issues are different and the decisions of the Court of Appeal need not necessarily be binding on this Court in a separate matter. According to the *ex parte* applicant, this Court is a Constitutional Court under the Constitution which ordinarily should have a first bite at any allegation of threat of violation or actual violation of the Constitution and it would be absurd and unacceptable to invite this Court to down its Constitutional function merely because a party to these proceedings, the 1st Respondent, has a pending appeal on a totally unrelated matters.

26. The *ex parte* applicant asserted that all the Respondents have approached this Court with very unclean hands in that: -

    (i) They have made similar appointments and in similar manner and fashion in a direct show of disrespect to this Court.

    (ii) They have failed to await the determination of the Court of Appeal before making similar appointments and in like manner.

    (iii) They have purported that the stay orders of the Court of Appeal gave them a blanket cheque to make similar appointments that this Court has declared unconstitutional.

27. The Respondents were accused of failing to disclose to this Court that there is general disquiet among the appointees and even in the affected parastatals with regard to the violation of the respective statutes and the *Constitution* in the said appointments and cited the example of Allen Gichuhi, the 225th Interested Party, who has tendered his resignation in confirmation of the issues and grounds raised in the instant proceedings.

28. It was the *ex parte* applicant's case that a stay of proceedings can only be based on a pending and active appeal and only the Court of Appeal can issue an order for stay of proceedings and consequently there is no basis for this Court to stay its own proceedings especially in the face of lack of statutory provisions vesting that jurisdiction. Since there is no Court of Appeal decision staying these proceedings, it is in the public interest that these proceedings be expedited to conclusion and the 1st Respondent can then exercise its right or appeal to the Court of Appeal.

29. The *ex parte* applicant reiterated that the Respondents are serial violators of the *Constitutio*n and Court orders and in the instant impugned appointments they have violated the Constitution and orders of this Court and are now relying on judicial craft and manoeuvring to buy time to sustain and continue the violation. In his view, this tactic of the Respondents to buy time is reminiscent in the previous appointments that have given rise to the pending appeal at the Court of Appeal where the Respondents delayed the matter only for this Court to make its determination at the lapse of the impugned appointments.

30. The *ex parte* applicant lamented that it is unknown when the Court of Appeal will sit and deliver its decision and the Respondents are relying on that to buy time so that by the time this Court pronounces itself, the terms of the appointees shall have lapsed, the appointees shall have served their time at public

expense with no remedy at all. The decision will be pyrrhic as in the previous matter that the 1st Respondent has appealed to the Court of Appeal.

31. This Court was therefore urged to dismiss the instant application for want of jurisdiction and for the other reasons given and allow the substantive Notice of Motion to be expedited so that the Respondents can appeal to the Court of Appeal if they so wish.

Applicant's Submissions*

32. On behalf of the applicant, it was submitted that this Court has the jurisdiction and the discretion to consider the application and to issue the orders sought. This submission was based on the decision in *Ezekiel Mule Musembi vs. H. Young & Company (E.A) Limited* [2019] eKLR.

33. It was submitted that it is also not in dispute that the Attorney-General has filed an appeal that has a bearing on the present judicial review application and that the appeal is pending determination at the Court of Appeal in Nairobi Civil Appeal No. 415 of 2021 - Attorney-General vs Katiba institute and 130 others. It was further submitted that it is equally not in dispute that if the applicant succeeds in Nairobi Civil Appeal No. 415 of 2021, while this court would have proceeded with the current proceedings to conclusion, the Court would have proceeded in vain. In this regard the applicant relied on the decision of the Court of Appeal in *Niazons (Kenya) Ltd. vs. China Road & Bridge Corporation (Kenya) Ltd*. Nairobi (Milimani) HCCC No. 126 of 1999 where Onyango-Otieno, J, *Wachira Waruru & Another vs. Francis Oyatsi* Civil Application No. Nai. 223 of 2000 [2002] 2 EA 664 and *Mark Omollo Agencies & 2 Others vs. Daniel Kioko Kaindi & Another* [2004] eKLR.

34. According to the applicant, the said pending appeal is not frivolous and that since the Court of Appeal is not bound by the findings of the High Court on the subject matter but as provided under the rules of procedure of the Court of Appeal, Rule 29(1)(a), it would be in consonance with judicial policy not to have parallel proceedings over matters so inextricably interconnected before different courts of competent jurisdiction and that it would be apt for the honourable court to exercise deference to the higher court by way of staying it's proceedings pending the determination of the pending appeal.

35. In light of all the foregoing the applicant prayed that the Court be pleased to stay the proceedings in this Judicial Review Application pending the hearing and determination of Nairobi Civil Appeal No. 415 of 2021 - *Attorney-General vs. Katiba & 130 Others*.

Ex Parte Applicant's Case

36. On behalf of the *ex parte* applicant, it was submitted that it is settled law that stay of proceedings is an exercise in judicial discretion. Like any other discretionary remedy, every Applicant must approach the Court in absolute good faith, make full disclosure and be candid, honest and truthful to the Court. Reliance was placed on Global Tours &Travels Limited, High Court of Kenya at Nairobi Winding Up Cause No. 43 of 2000, *Orbit Chemical Industries Limited vs. National Bank of Kenya Limited*, High Court of Kenya at Nairobi Civil Case No. 146 of 1999.

37. This Court, it was submitted, has always frowned upon lack of candour in exercising its discretion, has always declined to exercise its discretion where an applicant is economical with the truth and we urge this Court not to depart from its consistent approach in cases of lack of candour and concealment of material facts and decline to grant the orders sought in the Notice of Application.

38. It was contended that there is no jurisdiction of the High Court in the specific circumstances of this Court to stay its proceedings in the manner sought. Since this Court is exercising special jurisdiction, jurisdiction *sui generis*, there is no provision in the *Civil Procedure Code* or the *Law Reform Act* or in

any relevant statute to judicial review where this Court is vested with jurisdiction to stay its proceedings for the reasons advanced. Reliance was placed on the oft cited case of *Samuel Kamau Macharia & Another v. Kenya Commercial Bank & Another*, Supreme Court of Kenya Application No. 2 of 2011, and it was submitted that the *Constitution*, the *Law Reform Act* and the Order 53 of the *Civil Procedure Rules* do not confer jurisdiction upon this Court to stay its own proceedings in the exercise of its judicial review jurisdiction that is sui generis.

39. Though the 1st Respondent invoked the *Civil Procedure Act* and the *Civil Procedure Rules* it was submitted based on *Republic v. Clerk County Council of Meru & Another ex-parte Elisha Nkamani M'Mwari*, High Court of Kenya at Meru and *Sanghani Investments Limited v. Officer in Charge Nairobi Remand and Allocation Prison*, High Court of Kenya at Nairobi Miscellaneous Application No. 99 of 2006 the *Civil Procedure Rules* and the Civil Procedure Rules do not apply in judicial review proceedings as this Court is exercising sui generis jurisdiction that is neither civil nor criminal. Therefore, to the extent that the instant application has been brought under the *Civil Procedure Act* and *Civil Procedure Rules* the application is incompetent and is for dismissal.

40. It was submitted that under Order 53 of the *Civil Procedure Rules*, the only orders that flow therefrom are orders of prohibition, certiorari and mandamus as was appreciated in *Republic v. Registrar of Titles ex-parte Kenya Shell Limited*, High Court of Kenya at Nairobi Judicial Review No. 32 of 2011 and *Sanghani Investments Limited v. Officer in Charge Nairobi Remand and Allocation Prison,* High Court of Kenya at Nairobi Miscellaneous Application No. 99 of 2006. It follows that this Court only enjoys jurisdiction to continue with the determination of the substantive Notice of Motion application, leave having been granted, to determine whether to grant the order sought which is certiorari.

41. According to the *ex parte* applicant, the 1st Respondent has approached its application in a manner to suggest that the alleged appeal pending before the High Court has ousted the jurisdiction of this Court to determine questions revolving around Articles 10 and 232 of the *Constitution*. The Court was however urged to uphold the Constitution as the Court of Appeal has not ousted its jurisdiction, which is original, to determines matters concerning violation of Articles 10 and 232 of the *Constitution*.

42. It was contended that only the court of appeal has jurisdiction to stay these proceedings and that stay of proceedings is an unknown quantity, unknown to our jurisprudence, in judicial review proceedings. It was further submitted that only the Court of Appeal can stay the instant proceedings in the event of an appeal to the Court of Appeal under Rule 5(2)(b) of the *Court of Appeal Rule*s. However, there must be either an appeal from an order or decree or an intended appeal from an order of decree.

43. In the *ex parte* applicant's view, the issues before this Court are different from the issues in the said appeal. Besides, it is not the law that every decision of the Court of Appeal is automatically binding on the High Court and more specifically a decision that does not relate to the specific matter before the High Court. It was further submitted that Court of Appeal decisions can be distinguished and it is speculative whether the decision in the appeal will be positive in favour of the 1st Respondent so as to form the basis of urging this Court to adopt the reasoning therein. It was further submitted that the decision of this Court is automatically appealable to the Court of Appeal and consequently the mere fact that the Court of Appeal may decide one way or another does not make the decision of this Court final. It was urged that the 1st Respondent's appeal may as well be dismissed and therefore the allegation that the decision of the Court of Appeal may have a bearing in these proceedings is mere conjecture and speculation that we urge the Court to ignore and proceed to dismiss the application.

44. According to the *ex parte* applicant, it is the stock in trade and penchant of the 1st Respondent to seek to delay as much as possible any challenge to illegal appointments so that a decision of this Court is

made after the terms of the appointees have expired. It was submitted that it is trite law that a litigant should not leave a Court without a remedy and that such remedy, if any, should not amount to pyrrhic victory. Since it is unknown when the Court of Appeal will render itself given the current backlog at the Court of Appeal, it was submitted that a stay of these proceedings will lead to not only uncertainty but the possibility of the decision of this Court coming after three years when the terms of the impugned appointments have lapsed and any order of certiorari will be academic and absurd.

45. This Court was therefore urged to decline the invitation to stay these proceedings and to avoid a situation where the decision of this Court comes after three years when the appointments being challenged have lapsed and the appointees have served their terms and proceeded home. In the *ex parte* applicant's view, this is the absurd situation that the 1st Respondent want to create under the guise of stay.

46. It was submitted that these proceedings have been brought in the public interest and were satisfied urgent. Public interest is best served in the expeditious determination of the substantive Notice of Motion and not in grant of stay of further proceedings.

47. The Court was therefore urged in the public interest, to dismiss the instant application for stay and proceed to determine the main Notice of Motion expeditiously and whoever is dissatisfied with the decision is at liberty to appeal.

Determinations

48. I have considered the application, the affidavits filed in support of and in opposition to the application as well as the submissions filed.

49. It is not in doubt that this Court has powers to stay proceedings pending appeal and this jurisdiction is derived from both Order 42 rule 6 of the *Civil Procedure Rules* as well the inherent jurisdiction reserved in section 3A of the *Civil Procedure Act*. See *George Oraro vs. Kenya Television Network* Nairobi HCCC No. 151 of 1992.

50. This jurisdiction is meant to avoid a waste of valuable judicial time; prevent the court from duplication of efforts and prevent multiplicity of suits and applications being filed and where if the stay is not granted and defendant were to succeed it would have rendered the appeal nugatory. In such applications the Court aims at ensuring that the object of the application is not rendered nugatory and that substantial loss and irreparable harm is not suffered by the applicant once the Plaintiff proceeds with the suit and the appeal succeeds. Obviously the decision whether or not to grant stay of proceedings being discretionary, the application must be made without unreasonable delay. Whereas I agree that delay is neither the sole factor nor the predominant factor to be considered, I am convinced that delay is a factor that ought to be taken into account. *In Re Global Tours & Travel Ltd* HCWC No. 43 of 2000 Ringera, J (as he then was) held that:

> " As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matter, it should bear in mind such factors as the need for expeditious disposal of case, the *prima facie* merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity

and optimum utilization of judicial time and whether the application has been brought expeditiously."

51. In my view delay in making an application where the Court is expected to exercise discretion must always be a factor for consideration since it is an equitable principle that delay defeats equity as equity aids the vigilant, not the indolent.

52. Whereas the Court in such an application may be entitled to look at the intended appeal and see whether or not the intended appeal is not frivolous so as to satisfy itself that it is not being asked to suspend the proceedings so as to frustrate the hearing and delay the expeditious disposal of the matter, care must, however, be taken to ensure that the Court does not purport to preside over the intended appeal so as to avoid usurping the powers of the appellate Court.

53. In *David Morton Silverstein vs. Atsango Chesoni* Civil Application No. Nai. 189 of 2001 [2002] 1 KLR 867; [2002] 1 EA 296 the Court of Appeal citing *Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd & Another* Civil Application No NAI 50 of 2001 held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts. In *Niazons (Kenya) Ltd. vs. China Road & Bridge Corporation (Kenya) Ltd*. Nairobi (Milimani) HCCC No. 126 of 1999 Onyango-Otieno, J (as he then was) held that:

> "Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted."

54. Similarly, the Court of Appeal in *Wachira Waruru & Another vs. Francis Oyatsi* Civil Application No. Nai. 223 of 2000 [2002] 2 EA 664 held that:

> "In an application for stay of proceeding pending appeal where the Judgement is entered in an application for striking out a defence, it cannot be gainsaid that unless a stay is granted the appeal will be rendered nugatory since if the process of assessing damages goes on and the appeal is allowed that process would be an exercise in futility."

55. In the present case, the *ex parte* applicant has taken issue with the jurisdiction of this Court to grant the orders sought. It is contended that the application is grounded on *Civil Procedure Rules* which do not apply to judicial review; that only the Court of Appeal may stay the proceedings in questions and then only where there is an appeal against a decision of this Court. It is true that judicial review proceedings are proceedings sui generis and hence the *Civil Procedure Act* and the Rules thereunder save for Order 53 thereof do not apply to such proceedings. However, as stated hereinabove, the Court may in the exercise of its inherent jurisdiction stay proceedings before it. While section 3A of the *Civil Procedure Act* reserves the inherent jurisdiction of the Court, it is not the provision that clothes the Court with inherent powers.

56. There is always inherent power of the Court to do justice. Inherent power, it must be stressed is not donated by legislation. In *Ryan Investments Ltd & Another vs. The United States of America* [1970] EA 675 it was held that section 3A of the *Civil Procedure Act* is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in every court. The court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers. Dealing the same issue, it was held in *Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa* Mombasa HCMA No. 365 of 2006 that the Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository

power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences.

57. One of the instances in which the court exercises this residual power is in the fulfilment of its obligation to ensure that the orders it issues are not issued in vain. This was recognised by the Court of Appeal in *Nicholas Mahihu vs. Ndima Tea Factory Ltd & Another* Civil Application No. Nai. 101 of 2009 where it was held that the Court has the duty to ensure that its orders are at all times effective.

58. Similarly, Kimaru, J in *Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya* Nakuru Hccc No. 262 of 2005 held:

> " The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term "inherent", is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

59. In my view, this Court does not lose its inherent powers simply because it is exercising judicial review jurisdiction. That jurisdiction must always be available to the Court as a reserve to be drawn upon in order for the court to fulfil its mandate as the temple of justice.

60. Accordingly, I find that this Court may in appropriate circumstances stay its own proceedings on such conditions as are just. In my view one such instance is where there is a possibility of a proliferation of litigation.

61. In this case, it is contended that circumstances similar to the present ones existed in Petition No. 236 of 2018 - *Katiba Institute & Another vs. The Hon Attorney General & 129 Others* where a decision was made that was not favourable to the 1st Respondent herein. As a result, an appeal to the Court of Appeal was lodged before the Court of Appeal in Nairobi Civil Appeal No. 415 of 2021 - *Attorney-General vs. Katiba Institute and 130 others* and pursuant thereto the Court of Appeal applied brakes on the High Court judgement by granting stay of execution thereof. In his supporting affidavit, the *ex parte* applicant deposed that due to the repeated and obvious predilection of the Respondents in acting outside the Constitution and Statutes in making appointments to State Corporations, this Court ought not to stay these proceedings. In this regard the *ex parte* applicant pointed to the said Petition No. 236 of 2018 (*Katiba Institute & Another vs. The Hon Attorney General & 129 Others*) delivered on 27th May 2021 wherein this Court quashed a series of appointments made in similar fashion as this one. According to the *ex parte* applicant, this case among others by various Superior Courts did reiterate that any appointment that violate the provisions of Articles 10 and 232 of the Constitution is for quashing.

62. It is clear from the foregoing averments that some of the issues being ventilated herein are also the subject of the matter pending before the Court of Appeal. In those circumstances, in the absence of any other impediment, the Court might well have had compelling reasons to stay these proceedings in order not to risk conflicting decisions being made by the two Courts particularly since the Court of Appeal stayed the execution of the decision the subject of the appeal before it.

63. However, as held in *Global Tours &Travels Limited*, High Court of Kenya at Nairobi Winding Up Cause No. 43 of 2000:-

> " ...whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice...the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted."

64. Being discretionary, like any other discretionary remedy, every Applicant must approach the Court in absolute good faith, make full disclosure and be candid, honest and truthful to the Court. In my view, a party who approaches the Court for favourable exercise of discretion must come with clean hands. He must show that there is nothing that taints his journey towards the realisation of such reliefs. Applied to this case, though the Applicant sought for and obtained stay of the earlier decision, a stay does not reverse the earlier decision. What it does is to keep matters in situ during the pendency of the appeal. It does not open the floodgates for the applicant to commence fresh processes in the same manner as has been found to be unlawful or to continue doing what has been so declared.

65. In *Erinford Properties vs. Cheshire* (1974) 2 ALL ER 448, 449, it was held that stay of execution pending appeal is meant to preserve the status quo. See also *Charterhouse Bank Limited vs. Central Bank of Kenya & Another* Civil Application No. Nai. 200 of 2006 and *Samuel Ndiba Kihara & Another vs. Housing Finance Company of Kenya Limited & Another* Civil Application No. Nai. 11 of 2007.

66. It was therefore held by the Court of Appeal in *Re: Timothy Riziki Hopkins* Civil Application No. Nai. 194 of 2008 that a "stay" does not reverse, annul, undo or suspend what already has been done or what is not specifically stayed nor pass on the merits of orders of the trial court, but merely suspends the time required for performance of the particular mandate stayed, to preserve a status quo pending appeal and that the Court has no jurisdiction at the stage of application for stay of execution pending appeal to grant an order whose effect would be to reverse the decision of the Superior Court and legalise the resolution and the contract already nullified until the determination of the appeal since that can only be nullified upon the hearing of the appeal.

67. Therefore, where a party in whose favour an order of stay pending an appeal has been granted commences fresh processes along the lines of the annulled process on the basis of the stay, nothing bars an aggrieved party from moving the Court to have the new process halted as well. In other words, a party cannot seek to rely on a stay order to commence a fresh process in the like manner it did in the outlawed process.

68. In this case, it is alleged by the *ex parte* applicant that the Respondents proceeded, less than five (5) months after the decision in Petition No. 236 of 2018 (*Katiba Institute & Another vs. The Hon Attorney General & 129 Others*), to make similar appointments in the instant impugned Kenya Gazette and also proceeded to re-appoint individuals whose appointment were the subject of Petition No. 236 of 2018 aforesaid.

69. In my view such conduct if true would not speak well of the applicant's conduct. It would be the kind of conduct known by the digital generation as "uta do" and would amount to impunity on the part

of the Respondents. Though at this stage the Court cannot make any finding whether or not the said allegations are true, the said allegations constitute a serious state of affairs that require to be investigated promptly. A party should not create an awkward situation by starting a process similar to one which he is well aware was nullified by a court of competent jurisdiction, a finding whose final fate is yet to be decided and rely on a temporary reprieve to sanitise its actions. I must however state that these are mere allegations whose veracity will be decided at the hearing of the main motion. I however find that in light of those serious allegations, this Court ought to not to keep the matter in abeyance.

70. While therefore I find that this Court has the jurisdiction to stay these proceedings, I find that the alleged conduct of the Respondents, post the delivery of the judgement in Petition No. 236 of 2018 (*Katiba Institute & Another vs. The Hon Attorney General & 129 Others)*, if true, does not augur well for the favourable exercise of discretion.

71. Accordingly, I decline to stay these proceedings, dismiss the October 27, 2021and order the Motion dated October 13, 2021to proceed.

72. It is so ordered.

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 26TH DAY OF MAY, 2022.

G V ODUNGA

JUDGE

In the presence of:

Mr Kenyatta for the Applicant

Mr Wanjohi Munene for the Respondents.

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