



IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

(CORAM: A.K. NDUNG'U J.)

MISCELLANEOUS CAUSE NO. E126 OF 2021

REPUBLIC APPLICANT

VERSUS

DR. JOSEPH KINYUA, EGH

THE HEAD OF THE PUBLIC SERVICE 1ST RESPONDENT

THE SECRETARY TO THE STATE CORPORATION,

ADVISORY COMMITTEE..... 2ND RESPONDENT

THE ATTORNEY GENERAL..... 3RD RESPONDENT

THE RETIREMENT BENEFITS AUTHORITY..... 4TH RESPONDENT

HON. AMBASSADOR UKUR KANACHO YATANI,

THE CABINET SECRETARY, NATIONAL TREASURY,

& PLANNING MINISTRY 5TH RESPONDENT

AND

THE COUNCIL OF GOVERNORS1ST INTERESTED PARTY

THE COUNTY ASSEMBLY FORUM2ND INTERESTED PARTY

THE WATER SERVICE PROVIDERS

ASSOCIATION 3RD INTERESTED PARTY

THE COUNTY PENSIONERS

ASSOCIATION 4TH INTERESTED PARTY

AND

EX-PARTE APPLICANTCPF FINANCIAL SERVICES LIMITED

RULING

1. CPF Financial Services Ltd (herein after the Ex-parte Applicant) moved this court vide a chamber summons dated 18.8.2021 premised under section 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya and Order 53 Rule 1(1) & (2) 3, 4, 5 and 6 of the Civil Procedure

Rules 2010 seeking a raft of prayers. Of relevance to this ruling is prayer (d) thereof, leave having been granted by court on **20.8.2021**. The prayer reads;

“d) THAT the grant of leave above to operate as a stay of the implementation of the impugned directives by the Respondents, their agents and/or servants or any other person or state organ pending the filing, service, hearing and determination of the substantive judicial review application”.

2. The brief background of the application is that the 1st Respondent through a letter dated **16.7.2021** gave directives requiring various government agencies to;

a) *Treat the Local Authorities Pensions Trust (hereinafter, 'Laptrust') and the County Pension Fund (hereinafter, 'CPF') as public and, specifically, as state corporations; and*

b) *Exercise pervasive control and direction over Laptrust, CPF and their affiliated companies.*

3. Pursuant to those directions the 2nd Respondent acting on the instructions of the 1st Respondent issued a letter to the Group Managing Director of the Ex-parte Applicant requiring that Laptrust, County Pension Fund and its affiliates companies are public bodies and should henceforth comply with the state corporations Act as well as Mwongozo and other guidelines for state corporations contrary to the prevailing laws. The compliance was to be by close of business on 15.8.2021.

4. Mr. Otieno in oral submissions made a plea for grant of orders that the leave herein granted do operate as stay of the Respondents implementation of the impugned directions pending the determination of the substantive Judicial Review application. He argued that as yet there was no opposition to the prayer for stay as the parties have not responded to the application as earlier directed by the court. He urged that no prejudice would be suffered by any of the parties. The status of the applicant should be preserved. The impugned act is geared towards taking over a private company and turning it into a public body.

5. In rejoinder Ms. Nyakora brought to the attention of the court the existence of High Court Petition No. E320 of 2021 filed in the Constitutional and Human Rights Division of the Court seeking the same orders.

6. Mr. Mugisha stated that his client, the 4th Respondent is only a regulator and he associated himself with Ms. Nyakora's submissions.

7. Order 53 Rule 1(4) of the Civil Procedure Rules 2010 gives the court wide unfettered discretion to grant a stay. That discretion, like all others must be exercised judiciously. The key considerations are;

a) *Whether the Applicant has established an arguable case worth of further investigation during the substantive hearing.*

b) *Whether the stay would be efficacious in the circumstances.*

c) *Whether failure to grant the stay would render the substantive motion nugatory.*

(See R vs. Registrar of Companies Ex-parte Githongo POOIJ eKllr 299 and Oil Com. Kenya Ltd vs. PS Ministry of Roads and Public Works & Another [20181 KLR 104])

8. Strictly speaking no worthy arguments were proffered by the Respondents as to why the stay sought Should not be granted. But Ms. Nyakora has raised an important aspect to the matter the same being, the existence of High Court Petition No. E320 of 2021.

9. I have had the advantage of perusing the court proceedings in High Court Petition No. E320 of 2021. With the exception of the 2nd Respondent herein who is not a party in Petition No. E320, the Respondents as well as the Interested Parties in that matter are the same as in this case.

10. The substratum is the same in the two (2) matters notwithstanding that Petition No. E320 is couched as a Constitutional Petition while the matter herein is brought by way of Judicial Review.

11. Notably on the 20.9.2021, Hon. Justice A. Mrima issued the conservatory orders sought herein in Petition No. E320 above.

12. From the foregoing, the status of the Ex-parte Applicant is thus preserved by the existence of those orders.

13. I am reluctant at this stage to issue any orders in this matter to avoid a multiplicity of orders over the same subject matter.

14. An important revelation comes to the fore though. The running of the 2 parallel matters aforesaid in 2 courts of concurrent jurisdiction poses a potential danger of the possibility of conflicting orders emanating from the courts.

15. In the circumstances, I deem it necessary that the question of the nexus between the two (2) cases and the possibility of consolidation or stay of one of the matters awaiting a determination of the other be brought to the attention of the parties and directions be taken thereon.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OCTOBER, 2021

A. K. NDUNG'U

JUDGE

In the presence of:

Mr. Otieno for Applicant

Mr. Mugisha for 4th Respondent

Ms. Nyakora for 1st, 2nd, 4th and 5th Respondent

Court Clerk – David Ooko