



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JR MISC. CIVIL APPLICATION NO. 338 OF 2015

BETWEEN

ALLAN MATHENGE NDUNG’U.....APPLICANT

AND

**CABINET SECRETARY, MINISTRY OF LABOUR, SOCIAL SECURITY
AND SERVICES.....RESPONDENT**

AND

FRANCIS ATWOLI.....1ST INTERESTED PARTY

JACQUELINE MUGO.....2ND INTERESTED PARTY

PATRICK ONYANGO OGOLA.....3RD INTERESTED PARTY

LYN CHEROP MENGICH.....4TH INTERESTED PARTY

KARIITHI MURAGE MURIMI.....5TH INTERESTED PARTY

BOARD OF TRUSTEES, NATIONAL SOCIAL

SECURITY FUND.....6TH INTERESTED PARTY

RULING

1. By a Chamber Summons dated 8th October, 2015, the Applicant herein, **Allan Mathenge Ndung’u**, seeks the following orders:

1. That this application be certified urgent and the same be heard *Ex parte* in the first instance
2. That the Applicant be granted leave to apply for:-
 - 2.1 An order of Certiorari do issue to remove into this court and quash:-

- i. Gazette Notice No. 6752 of 16th September 2015, specifically the appointment of Francis Atwoli and Jacqueline Mugo as members of NSSF's Board of trustees;
- ii. Gazette Notice No. 6753 of 16th September 2015, specifically the appointment of Patrick Atwoli Onyango Ogola and Lyn Cherop Mengich, as members of NSSF's Board of Trustees;
- iii. Gazette Notice No. 6554 of 16th September 2015 specifically the appointment of Kariithi Murage Murimi, as a member and chairperson of NSSF's Board of Trustee;

2.2 An order of mandamus do issue, directed at the Cabinet Secretary, Ministry of Labour, Social Security and Services, to reconstitute the NSSF Board of Trustees such that it complies with the law and through a process that meets the national values of good governance and threshold of a lawful, fair, reasonable and procedurally fair administrative action.

2.3 An order of Prohibition do issue;

- a. Prohibiting the Cabinet Secretary for the time being responsible for matters relating to social security from exercising any of its powers of appointment or removal under Sections 6,7 and 8 of the NSSF Act, without first complying with the threshold requirements of Sections 6(3) of the State Corporations Act and Sections 6, 7 & 8 of the NSSF Act, and through a process that meets the national values of good governance and threshold of a lawful, fair, reasonable and procedurally fair administrative action under Articles 10, 47 and 232(1) of the Constitution and the Fair Administrative Actions Act (Act No. 4 of 2015).
- b. Prohibiting the NSSF Board of Trustees from exercising any of its powers and functions under Sections 5 & 10 of the NSSF Act, until the Cabinet Secretary, Ministry of Labour, Social Security and Services, reconstitutes the NSSF Board to meet the threshold requirements set out in the State Corporations Act and the NSSF Act.

3. That the leave so granted do operate as stay of:-

- i. operation of the decision of the Respondent contained in Gazette Notice No. 6752 of 16th September 2015 specifically the appointment of Francis Atwoli and Jacqueline Mugo as members of NSSF's Board of Trustees;
- ii. operation of the decision of the Respondent contained in Gazette Notice No. 6753 of 16th September 2015, specifically the appointment of Patrick Onyango Ogola and Lyn Cherop Mengich as members of the NSSF's Board of Trustees;
- iii. operation of the decision of the Respondent contained in ~Gazette Notice No. 6754 of 16th September 2015, Specifically the appointment of Kariithi Murage Murimi, as a member and chairperson of NSSF's Board of Trustees;
- iv. Any further proceedings or sittings of the NSSF Board of trustees, as presently constituted.

4. That the court be at liberty to make such further orders as it may deem proper in the circumstances and for the expedited hearing and determination of this matter.

5. That the costs be provided for.

2. According to the Applicant, the process leading to and indeed the appointments of the 1st to 5th interested parties to the Board of Trustees of NSSF (hereinafter referred to as "the Fund") is vitiated by numerous illegalities under the *National Social Security Fund Act* (hereinafter referred to as "the Act") and the State Corporations Act, was administratively arbitrary flawed, was procedurally unfair, unreasonable and offends provisions of Articles 10(2), 47 and 232(1) of the Constitution.

3. It was contended that with respect to **Mr Atwoli** and **Ms Mugo**, both were ineligible to serve as

members of the Board having previously served thereon for more than 2 three-year terms. It was therefore contended that the Respondent acted illegally and *ultra vires* in making the said appointments and her decision was unreasonable and failed to take into account relevant factors.

4. With respect to the appointments of **Patrick Onyango Ogola, Lyn Cherop Mengich and Kariithi Murage Murimi**, it was contended that there was no meaningful process or fair process of the removal of the incumbents hence their removal was arbitrary and contrary to the Act. The said action it was contended was arbitrary and was exercised in a discriminatory manner hence amounted to abuse of authority. It was further contended that the said action violated legitimate expectation.

5. On the part of the respondents and interested parties it was contended that the said appointments were done in accordance with the law and that they were informed by the fact that due to numerous legal challenges to the members of the Board, the Board was unable to effectively carry out its duties hence the necessity to reconstitute the same in the interest of the public.

Determinations

6. I have considered the issues raised herein.

7. The requirement for leave was explained by a three judge bench comprising **Bosire, Mboghli-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321**, Nyamu, J (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See also **Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353**.

8. **Waki, J** (as he then was), on the other hand, in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** put it thus:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially”.

9. This position was confirmed by the Court of Appeal in **Meixner & Another vs. Attorney General [2005] 2 KLR 189** in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.

10. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated in Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8 as follows:

“If he [the Applicant] fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers...”

11. In Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK), the Court stated:

“Application for leave to apply for orders of judicial review are normally *ex parte* and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court’s discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him.... Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of John vs. Rees [1970] Ch 345 at 402. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration.”

12. This position was appreciated by Majanja, J in Judicial Review Misc. Civil Appl. No. 139 of 2014 between Vania Investments Pool Limited and Capital Markets Authority & Others in which the learned Judge expressed himself as follows:

“I do not read the Court of Appeal to be saying that the Court should not have regard the facts of the case or have at best a cursory glance at the arguments. As I stated in Oceanfreight Transport Company Ltd vs. Purity Gathoni and Another Nairobi HC Misc. Appl JR No. 249 of 2011 [2014] eKLR, “In my view, the reference to an “arguable case” in W’Njuguna’s Case is not that the issue is arguable merely because one party asserts one position and the other takes a contrary view.” The duty of the court to consider the facts is not lessened by the mere conclusion that the case is frivolous, or that leave is underserved by examining the facts...Indeed, if leave was to be considered a matter of right then the purpose for which leave is required would be rendered otiose.”

13. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a *prima facie* arguable case for grant of leave. Whereas he is not required at that stage to go into the depth of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile. The grant of leave being an exercise of discretion the conduct of the applicant must also be considered.

14. In this case, the applicant contends that the appointment of the interested parties was illegal in that some of the appointees were ineligible to be appointed to the said positions while the process of removal of the incumbent was unprocedural, arbitrary and amounted to abuse of power and authority. Further the said action amounted to a violation of the incumbent’s legitimate expectation.

15. Whereas at this stage I cannot and I am barred from dealing with the merits of the applicant's case, I have considered the grounds raised and the constitutional and statutory provisions relied upon and I am of the opinion that the same cannot be said to be frivolous. In the circumstances I am satisfied that the Applicant has disclosed *prima facie* case warranting the grant of leave sought. Leave is accordingly granted to the Applicant to commence judicial review proceedings as sought in the Chamber Summons dated 8th October, 2015 and the substantive motion is to be filed and served within 10 days.

16. With respect to stay, the mere fact that the application discloses a *prima facie* case does not automatically warrant the grant of stay of proceedings in question. The Court, despite a finding that the applicant has established a *prima facie* case must proceed to address its mind on whether or not to direct that the leave so granted ought to operate as a stay of the proceedings in question and that determination is no doubt an exercise of judicial discretion and hence like any other judicial discretion must be exercised judicially and not capriciously or whimsically.

17. Where, the decision sought to be quashed has been implemented leave ought not to operate as a stay since in that case there may be nothing remaining to be stayed. If the Court were to grant a stay in such circumstances it would amount to in effect granting the orders in the Motion before the same is heard. It is only in cases where either the decision has not been implemented or where implementation is incomplete that stay may be granted. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**

18. However even where the leave is granted, it was held in **Jared Benson Kangwana vs. Attorney General Nairobi HCCC No. 446 of 1995** that in considering whether the said leave ought to operate as a stay of proceedings the Court has to be careful in what it states lest it touches on the merits of the main application for judicial review and that where the application raises important points deserving determination by way of judicial review it cannot be said to be frivolous.

19. In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding.

20. **Maraga, J** (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** was of the view that:

“As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction...In judicial review applications the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act...A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.”

21. Therefore it is not in every case that there are chances of the High Court reaching a decision contrary to the one in the proceedings sought to be stayed that the High Court will stay those proceedings. It must be shown that the probability, rather than the possibility, of a determination being made in the challenged proceedings, is high. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor.

22. In this case what is being challenged is the Gazette Notice appointing the interested parties as members of the Board. That appointment has already been made vide the impugned Gazette Notice. Until the said Gazette Notice is nullified by this Court, the Court cannot under the pretext of granting stay grant orders whose effect would be to nullify the impugned Gazette Notice. Therefor in considering whether or not to grant stay, the stage at which the proceedings being challenged have reached and the effect of the grant of stay are important and relevant factors for consideration in arriving at such determination.

23. In this case, apart from the protagonists there are third parties involved or affected by the affairs of the Board. In such matters as these the Court, in considering the nature of the orders to grant ought to take into account the principle of proportionality and see where the scales of justice lie. With the advent of the overriding objective it is clear that the Court must swing its gates wide open in terms of being broadminded on the issue of justice in the context of the circumstances before it. Thus, one of the principal aims of the overriding objective is to approach the exercise of power or discretion under any proviso or rule, with a sense of balance or proportionality. The law is now that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate ends of justice. In so deciding the Court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. See Kenya Pipeline Company Limited vs. Stanley Munga Githunguri Civil Application No. Nai. 300 of 2010 [2011] eKLR and Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.

24. The effect of the grant of stay would be to bar the interested parties from participating in the affairs of the Board while not necessarily reinstating their predecessors to the Board. That state of affairs is likely to bring the affairs of the Board to a standstill. Therefore in the circumstances of this case, it is my view that the course of justice will be better served by maintaining the *status quo*.

25. In the premises I decline to direct that the grant of leave herein shall operate as a stay of the proceedings in question.

The costs of this application will be in the cause.

Dated at Nairobi this 18th day of November, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Murithi for the ex parte applicant

Mr Okweya Achando for the 1st interested party

Mrs Kinara for Mr Sisule for the 3rd and 4th interested parties

Cc Patricia