



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Judicial Review 352 of 2012**

**IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLE 22(1) & (2)(C) ON THE ENFORCEMENT OF**

**BILL OF RIGHTS; 41(1) ON LABOUR RELATIONS; AND 47(1) ON FAIR ADMINISTRATION OF JUSTICE**

**AND**

**IN THE MATTER OF SECTION 8 OF THE CAPITAL MARKETS AUTHORITY ACT CAP 485 A**

**LAWS OF KENYA ON THE APPOINTMENT OF THE CHIEF EXECUTIVE OF THE AUTHORITY**

**AND**

**IN THE MATTER OF THE DECISION ON THE APPOINTMENT OF THE CHIEF EXECUTIVE OF THE**

**AUTHORITY FOR CAPITAL AUTHORITY BY THE MINISTER OF FINANCE HON. NJERU GITHAE**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**HON. NJERU GITHAE MINISTER OF FINANCE.....RESPONDENT**

**EX PARTE**

**JACKSON GICHUKI.....1<sup>ST</sup> APPLICANT**

**SYLVESTER GITHAIGA.....2<sup>ND</sup> APLICANT**

**JUDGEMENT**

**INTRODUCTION**

1. By a Notice of Motion dated 26<sup>th</sup> September 2012 filed on 27<sup>th</sup> September 2012 the same day, the *ex parte* applicants herein, **Jackson Gichuki and Sylvester Githaiga**, seek the following orders:

1. a) **An Order of Certiorari be granted to move to this Honourable court and quash the decision made by Hon. Njeru Githae, Minister of Finance for abrogating himself powers on the appointment of the Chief Executive officer of the capital markets authority as indicated in the Business Daily dated 13<sup>th</sup> September, 2012 and all other media sources contrary to Section 8 Cap 485A on Appointment of Chief Executive of the Authority; which vests the powers on the President of the Republic of Kenya. The Minister therefore acted ultra vires and that his decision that the three (3) shortlisted applicants of the said position did not meet the Treasury requirements is a nullity and void *ab initio*.**

b) **An Order of Certiorari to move to this Honourable Court that any directives that might have been given by the aforesaid Minister to his officers, servants and/or agents whether of any other body or organization, on the appointment of the said Chief Executive Officer the same be declared ultra vires and therefore null and void.**

c) **An Order of Mandamus directing the Honourable Minister of Finance to forward the names shortlisted by the board, forthwith to His Excellence the President Honourable Mwai Kibaki, with his recommendations as per Section 8 of the Capital Markets Authority Act who shall make a final decision.**

d) **An Order of prohibition against Hon. Minister of Finance from interfering with the appointment process of the Chief Executive Officer of the Capital Markets Authority other than making recommendations to the President since he has no other powers or at all provided to him by the said Act.**

2. **That the leave so granted in (1) above do operate as a stay for with as regards all proceedings going on in the recruitment of the Chief Executive Officer of the Capital Market Authority.**

3. **That costs of and incidental to this application be provided for.**

4. **Such further and other relief that the Honourable court may deem just and expedient to grant.**

#### **EX PARTE APPLICANTS' CASE**

2. The said Motion is supported by Statutory Statement filed 24<sup>th</sup> September 2012 and Verifying Affidavit sworn the same day by **Jackson Gichuki** the 1<sup>st</sup> *ex parte* applicant herein.

3. According to the deponent, he is an Advocate of the High Court of Kenya and according to the *ex parte* applicants, the appointment process of the Chief Executive Officer Capital Markets Authority since 1<sup>st</sup> June 2012 to 13<sup>th</sup> September 2012 has been the Constitution, all known laws of this country, fair and transparent and it is the Respondent who is interfering with the process by acting illegally, arbitrarily, unreasonably and there ultra vires. It is deposed that the advertisement for the position of the Chief Executive Officer was placed in the media and the Authority's website and was open to all Kenyans and the application was to be addressed to the Chairman of the Authority. It is deposed that 24 people responded to the said advertisement.

4. According to him the conduct of the interviews for the position was tasked with Hawkins and Associates who after doing so shortlisted 3 people whose names were forwarded to the Respondent in line with section 8 of the Capital Market Authority Act (hereinafter referred to as the Act). The said names, according to him, were **Wanjiru Mugane MBS, Rose M. Lumumba** and **Paul Mwai**. According to the applicants under section 8 thereof the Chief Executive of the Authority is to be appointed by the Minister on recommendation of the Minister while under section 8(3) thereof the Minister is to make the said recommendation in consultation with the Board.

5. Although, according to the applicants the three shortlisted persons qualified for the said appointment, according to comments attributed to the Minister he rejected the said names because they did not meet the Treasury Requirements and suggested a repeat of the exercise on the upgrading of the agency to category "A" status-owned firms. In the applicants' view, there is no requirement that the appointee meets the nebulous Treasury Requirements which are unknown to law. Further as per section 8 aforesaid the Respondent has no powers to unilaterally cancel the said shortlisted candidates as his power is merely to make recommendation and the powers of appointed are vested in the President. It is therefore contended that the Respondent's action are in contravention of clear statutory provisions as all he needs to do is to forward the names and recommendation to the President who is mandated in law to either make the appointment or decline to do so. Accordingly, it is the applicants' view that the Respondent's actions are a nullity, illegal and ultra vires and the orders sought would safeguard the importance of public policy as provided in the written law and contrary to the constitution, public policy and causing tremendous uncertainty to a very important institution for investors in Kenya.

### **RESPONDENT'S CASE**

6. In opposition to the application the Respondent filed the following grounds of opposition.

**1. The Minister of Finance is under no obligation to give a positive recommendation to the President on any candidates for the position of chief executive officer of the Capital Markets Authority.**

**2. That the Minister of Finance has not made any appointments in respect to the position of Chief Executive Officer of the Capital Markets Authority.**

**3. That the Minister of Finance has discretion to make any recommendations as he considers appropriate to the President on persons shortlisted by the board of the Capital Markets Authority for the position of the Chief Executive Officer and the President is not bound by his decision.**

**4. That this Honourable court would be acting in vain if it were to issue orders of certiorari as proposed as the Minister did not purport to appoint nor can he appoint any person as the Chief Executive Officer of the Capital Markets Authority.**

**5. That the ex-parte applicants are approbating and reprobating when they allege on one hand that the Minister has made recommendations that are ultra-vires on the other hand the ex-parte applicant are alleging that the Minister has not made recommendations hence the need to issue an order of Mandamus directing the Minister to make recommendations to the President.**

**6. That the court would be usurping the Minister's mandate if it were to order the minister to given recommendations in a particular manner as proposed by the ex-parte applicants.**

**7. That the entire application is premised on hearsay evidence as there is no evidence of any official communication on the matter by the Minister which is in writing.**

**8. That the President has not made any decision on the matter therefore none of the persons recommended by the board have been prejudiced in any way: that the minister has made recommendations that the candidates have not met treasury requirements in the circumstances cannot be said to have influenced the President's decision.**

**9. That the making of a recommendation is a discretionary power vested upon the Minister and it cannot be said that that is not a decision.**

**10. That the three shortlisted candidates had no right of hearing before the Minister of finance or the President as alleged.**

### **EX PARTE APPLICANTS' SUBMISSIONS**

7. In support of the application the *ex parte* applicants submitted that judicial review is the law concerning control by the courts of the powers, functions and procedures of administrative authorities and bodies discharging public functions. The Courts, it is submitted, do not come in to review the powers of the public bodies or the decisions which have been made but only come in to review the manner in which such decisions were arrived at by the relevant authority hence the decision of **Warsame, J** (as he then was) in **Cape Holdings Limited vs. A G & 2 Others Misc. Application No. 240 of 2011** is cited for the proposition that judicial review is concerned with decision making process and not with the merits of the decision itself and deals with the illegality of the decisions of a public body. After setting out the circumstances under which the said orders are to be granted, it is submitted that though the Minister's power is to make recommendation, in the instant case, the Minister quashed the appointment hence was contrary to the clear provision of the procedural law. It is contended that the Respondent should follow the law and not quash the decision based on unfounded "Treasury Requirements". It is further submitted that the Act is clear on the duty of the Minister and hence mandamus should issue to compel him to forward the said names to the President for appointment or either other recommendations. It is submitted that the Minister has no powers or at all to make any recommendation.

### **RESPONDENT'S SUBMISSIONS**

8. On behalf of the Respondent, it was submitted that under Order 53 rule 4(1) of the Civil Procedure Rules, no grounds shall subject to the rules thereunder be relied upon or any relief sought at the hearing of the motion save the grounds and relief set out in the statement of facts hence the *ex parte* applicants are bound by their pleadings. It is further submitted that though the *ex parte* applicants had sought four orders of judicial review from the order issued on 26<sup>th</sup> September 2012 they were only granted leave to seek two reliefs.

9. It is submitted that the *ex parte* applicants have produced no evidence at all before the court to demonstrate the allegations made therein since none of the three shortlisted candidates gave any evidence to prove the said allegations and the applicants did not produce any communication from the Respondent to the Board of the Capital Markets Authority to show that the Respondent had made any decision on the matter let alone in the manner suggested by the *ex parte* applicants. It is submitted that the law of evidence places the onus of proof on the party who wishes the court to give a finding of the existence of a matter in his/her favour. Apart from newspaper cutting whose author was never called to positively aver on the contents of his report the *ex parte* applicants, it is submitted, produced no proof at all on the facts they wish the Court to make a finding on. Since the Evidence Act prohibits reliance on hearsay evidence it is submitted that what is contained in the verifying affidavit of **Jackson Gichuki** is inadmissible.

10. While conceding that it is the President who is mandated to appoint the Chief Executive Officer of the Authority, it is pointed out that the respondent has not purported to make any appointment and in any event the entire process is initiated by the Board of Directors who shortlist three successful candidates to the Respondent for recommendations to the President. According to the Respondent, he is not under any obligation to make recommendations in any specific manner as the Act gives him discretion to make recommendations to the President as he sees appropriate and this Court would be usurping his mandate if it were to order him to make recommendations in a particular manner. The duty to make recommendations, it is submitted includes not only the duty to make positive recommendations but negative recommendations as well. Since the President has not made any decision on the matter, it is submitted that it is premature to presume that he has made any decision on the basis of any recommendations by the Respondent if any since he is not under any obligation to be bound by the Respondent's recommendation. Since there has been no communication to the three shortlisted candidates or the Board of the Authority the present application is at best speculative and not premised on factual position that would merit the issuance of the orders sought hence no case has been made to merit the grant of the orders sought.

### **DETERMINATIONS**

11. After considering the foregoing this is the view I form of the matter. I must say with respect that the submissions made by the applicants were rather disjointed and failed to pin-point at the facts which go to

show that the decision making process undertaken by the Respondent was unlawful. Apart from citing the decisions which deal with the general principles upon which judicial review orders are granted the *ex parte* applicants failed to bring the case within the said principles.

**12. In Republic vs. Kenya National Examinations Council ex parte Geoffrey Githinji and 9 Others Civil Appeal No. 266 of 1996** it was held:

**“the remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment.”**

13. Therefore where public authorities abuse their powers the Court is empowered to intervene and bring to an end such abuse of power since under Article 129 of the Constitution, executive authority is to be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit. Public authorities must also be aware that under the provisions of Article 47 of the Constitution every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and that in the exercise of their powers discretionary or otherwise they must take into account national values and principles of governance enshrined in Article 10 of the Constitution which include good governance, integrity, transparency and accountability, the rule of law, democracy and participation of the people.

14. In this case whereas it is true that the Minister has discretion to make recommendations the said recommendations must be made in consultation with the Board. Whereas the Respondent argues that the discretion given to him include powers to make positive as well as negative recommendations, in my view, with respect to the so called negative recommendations one must be careful not to make recommendations whose effect is to negate the very substratum of the appointment. If for example the Minister were to recommend to the President that the President should not appoint the Chief Executive at all in light of the mandatory provisions of section 8 of the Act, it is doubtful whether such a recommendation would be upheld by a Court of law. In my view, I daresay that the only recommendation that the Minister can make under section 8 thereof is that the President appoints a particular person to the office of the Chief Executive of the Authority. He is not obliged to make a recommendation but when he makes a recommendation that recommendation has to be geared towards an appointment rather than in the negative. That in my view is the only way in which the lengthy process of interviews and short listing may be realised as well as the national values and principles of governance outlined hereinabove. It would defeat the whole process of accountability if after the said process the Minister were free to unilaterally recommend that the appointment ought not to be made after all.

15. In the instant case it is true that leave was only granted in terms of prayer 2(c) and (d) of the Chamber Summons dated 24<sup>th</sup> September 2012. Following the General Elections which were conducted on the 4<sup>th</sup> March 2013 and the events subsequent thereto it is clear that prayer 2(c) is incapable of being granted in the manner in which it is framed. In **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised, the court would not grant the order sought even if merited. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**

16.As was held in Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354:

“Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce evidence* to be adduced for the determination of the case on the merits.....Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application.....It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.”

17.However, with respect to prayer 2(c) the same can only be granted where what is sought to be prohibited is threatened. Without a threat of a violation the Court cannot grant an order of prohibition in *vacuo*. In the present case, the allegation made against the Respondent, is not that he is interfering with the process but that he has declined to make recommendations in line with the decision of the short listing body. In the absence of evidence that the Respondent has interfered with the process this Court is unable to grant the said orders as to grant the same would amount to granting an order in the nature of a declaration and that is not the kind of order contemplated under sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya.

### **ORDER**

18.Having said that it must now be clear that the Notice of Motion dated 26<sup>th</sup> September 2012 ought not to be granted. The same is disallowed but with no order as to costs.

**Dated at Nairobi this day 26<sup>th</sup> of April 2013**

**G V ODUNGA**  
**JUDGE**

*Delivered in the presence of Mr Njogu for Mr Kariw for the applicant and Miss Kenyani for the Respondent.*