



REPUBLIC OF KENYA

High Court at Bungoma

Miscellaneous Civil Application 36 of 2012

(Formerly Nairobi HC Misc. Civil Appl. No.182 of 2011)

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI AND MANDAMUS**

AND

**IN THE MATTER OF UNPROCEDURAL DE-GAZETTEMET OF THE APPOINTMENT OF
JULIUS NYAROTHO**

FORMER CHAIRMAN AND MEMBER OF BOARD OF NZOIA SUAGR COMPANY LIMITED

IN THE MATTER OF THE STATE CORPORATION ACT (CAP 446) LAWS OF KENYA

JULIUS NYAROTHO.....APPLICANT

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

MINISTER FOR AGRICULTURE.....2ND RESPONDENT

NZOIA SUGAR COMPANY LIMITED.....3RD RESPONDENT

LAWRENCE SIMIYU SIFUNA.....4TH RESPONDENT

JUDGMENT

The Application

[1] A substantive application for judicial review orders was filed on 7th March, 2012 in the High Court at Nairobi. The file was then on 18/4/2012 transferred and transmitted to Bungoma for hearing and disposal. The significant orders sought in the application are:

- 1) *...an order of Certiorari quashing the revocation of the appointment of the Applicant as the Chairman of Nzoia Sugar Company Limited, contained in Kenya Gazette Notice No.8003 published on 15th July, 2011 in Vol.CX11 – No.63.*
- 2) *...an order of Mandamus compelling the 1st and 2nd Respondents to re-instate the applicant as the Chairman of Nzoia Sugar Company Limited.*
- 3) *...an order...restraining the 4th Respondent from carrying himself out as a bona fide Chairman of Nzoia Sugar Company Limited and from assuming or transacting any business as the Chairman of Nzoia*

Sugar Company Limited and further restraining the 3rd Respondent from dealing with the said 4th Respondent as the chairman thereof.

[2] The application is supported by a Statutory Statement and a Verifying Affidavit of Julius Nyarotho.

[3] The Ex parte Applicant states that he was duly appointed as the Chairman of the Nzoia Sugar Company Limited for a period of three (3) years under section 6(1) (a) of the State Corporations Act by name and Gazette Notice No. 5555 dated 21st May, 2010.

[4] According to the Ex parte Applicant, his said appointment was revoked retrospectively with effect from 21st January, 2011 by Gazette notice No. 8003 dated 8th July, 2011 which appointed the 4th Respondent.

[5] The appointment of the 4th Respondent was in violation of the law.

[6] The revocation of the appointment of the Ex parte applicant did not follow due process of the law and completely offended the rules of natural law.

[7] There were no reasons given to the Ex parte applicant for the revocation of his appointment.

Respondents' case

[8] The Attorney General filed the following grounds of opposition for the 1st & 2nd Respondents dated 7th November, 2011:

1. the 2nd respondent has not made any decision capable of being quashed.

2.The gazette notice in question was issued by the president of the Republic of Kenya who is not party to these proceedings.

3.These proceedings have been instituted against the Minister for Agriculture who did not make the decision in question as evidence by the gazette notice annexure marked 'JN2'

*4.That the concept of vicarious liability is a concept limited to the Civil jurisdiction of this Honourable Court which jurisdiction has been expressly ousted by the provisions of section 89(1) of the Law Reform Act (**refer to the decision of the court of Appeal in Commissioner of lands versus Hotel Kunste**).*

5. That judicial review orders cannot be issued against the person of the President of the Republic of Kenya since they are orders issued in his name as the Head of State.

6.That by dint of the provisions of section 8(2) f the law Reform Act . this Honourable Court can only issue orders which the High court in England is, empowered to make and since the Court of England cannot issue orders against the Crown the same would ordinarily apply.

7.The notice of motion is improperly instituted and should be struck out in the first instance.

8.Judicial review remedies are in any event not efficacious in the circumstances of this case.

[8] The 3rd and 4th Respondents filed the following grounds of opposition dated 12th November 2012 :

1. THAT the application dated 4.8.2011 is incompetent and misconceived.

2. THAT the Republic is not the applicant and the application is therefore fatally defective.

3. THAT the application is not founded on the Law Reform Act and hence fatally defective.

4. *THAT the decision complained of was not by the Minister for Agriculture . The decision was made by the President.*

5. *Other grounds to be raised at the hearing.*

A preliminary objection was raised

[9] A Preliminary Objection was raised to the effect that these proceedings are fatally defective, for, they were improperly intituled in the name of the Ex parte Applicant instead of the Republic as should be under the law. The objection was dealt with by the court in the ruling delivered on 19/9/2012. The court found that want of form should not disentitle a party from being heard on the merits of his application. Article 159(2) (d) of the Constitution was sufficiently relied upon by the court and I wish to reinforce those elegant provisions that it is most desirable that cases are decided on merit rather than technicalities. I agree with Mr. Kasamani that aspect is *res-judicata* and cannot be re-litigated again under the pretext of arguing the main motion.

Major issues

[10] From the pleadings the following are the major issues the court should determine;

- a) *Whether the President should be made a party in JR proceedings for orders to issue.*
- b) *Whether or not judicial review lies on an action by the President.*
- c) *Whether the orders of Certiorari, Mandamus and of injunction sought herein should issue.*

a) Whether the President should be made a party in JR proceedings

[11] This is an opportune constitutional moment in our nation. Courts of law, legal practitioners, scholars and other distinguished disciplines are engaged in interpretation sessions of the Constitution of Kenya, 2010. The question being asked here is quite monumental. It touches on immunity of the President from legal proceedings as guaranteed under Article 143 of the Constitution; whether or not the President should be made a party in these proceedings for the orders sought to lie. Article 143 provides:

143. (1) *Criminal proceedings shall not be instituted or continued in any court against the President or a person performing the functions of that office during their tenure of office.*

(2) *Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution.*

[12] I take the view that Article 143 of the Constitution protects a sitting President from legal proceedings. The Constitution has however, under sub-article (4) of Article 143, created an exception to the protection offered with regard to legal proceedings against the President for which the President may be prosecuted under any treaty to which Kenya is a party and which prohibits such immunity. In other words, except in those exceptions allowed under the law, a sitting President cannot ever be made a party to any legal proceeding in court. Any argument that would suggest a possibility of enjoining a sitting President as a party so that orders of judicial review can issue, to say the least, would be quite blind to the provisions of Article 143 of the Constitution. But it should be understood that the immunity in Article 143 of the Constitution only lasts for the time the President is in office.

b) Whether judicial review would lie against an order of the president

[13] The question to ask is: Whether, there is a legal way the people of Kenya can question any improper exercise of public power vested in the President, especially where the Constitution and Statute law have been violated. I will approach this issue by looking at three important constitutional matters. One, the

constitutional duty of the President to adhere to, promote and protect the Constitution and all laws made under the Constitution. Two, judicial review as a public law remedy under the Constitution. Three, the role of public law of the state on these matters.

[14] Needless to state that, the Presidency is a creature of the Constitution. According to Articles 1(3) (a), 129 and 130, the executive authority is derived from the people and is exercised in accordance with the Constitution. The presidency should adhere to, promote and protect the Constitution, to mention a few say; observe national values and principles of governance (Article 10), observe principles of executive authority, maintain integrity for leadership (chapter six), observe legal requirements, and respect the authority of the judiciary. If the presidency violates the requirements of due process of the law as laid down in Constitution or any statute law, the Constitution is not helpless, as, it is self-referential and does not suffer a wrong without a remedy. Therefore, judicial review will lie against an order of appointment made by a sitting President in contravention of the law. This is a public law remedy which is directed to the state itself as the president exercised executive authority of state. It is a subject that is governed by the public law of the state. A narrow and strict interpretation of Article 143 of the Constitution would offend Article 259 of the Constitution which demands a purposive interpretation in order to give effect to the objects, purposes and values of the Constitution.

[15] According to Article 73 of the Constitution, authority assigned to a state officer is a *public trust*. On this basis, the Constitution installs a responsibility on the executive to serve the people rather than the power to rule the people; be accountable to the people, and respect the rule of law. See Article 129 also. Strict interpretation of Article 143 of the Constitution without regard to the objects, values, purposes and spirit of the Constitution, as suggested by the Respondents, particularly the Attorney General will; 1) deprive the public the right to demand for public answerability from the office of the president on the exercise of the sovereign authority they have delegated to the executive; 2) disparage the Constitution and promote impunity. These matters are placed in the public law of the state as a deliberate constitutional approach in order to enable the Constitution to avoid an absurd state of affairs that would otherwise be created by a narrow interpretation of Article 143. The courts reconcile the dichotomy of ensuring that there is no violation of the Constitution or the law that goes without a remedy whilst maintaining the integrity of the presidency which is a symbol of the Republic of Kenya by simply upholding and protecting the Constitution. In such suit as this, the Attorney General is the proper party. In countries with robust Constitution, including Kenya, courts have questioned actions or inaction by the President in so far as the deed or omission thereof has violated the law. Although in the instances where courts have invoked judicial review to right the wrongs by the executive have been equated by some pundits to judicial activism, I am convinced, it is simply a judicial path that is permitted by the Constitution itself as a way of attaining checks and balances within the doctrine of separation of powers. See the case of **BGM HCCC NO 42 OF 2012 [2012] eKLR** and the case of **CENTRE FOR RIGHTS EDUCATION & AWARENESS & 6 OTHERS V ATTORNEY GENERAL NBI HC PET NO. 208 & 209 OF 2012**.

Judicial Review is a constitutional remedy

[16] Undoubtedly, Judicial Review is a public law remedy. Indeed, it is one of the constitutional reliefs grantable on a proceeding brought under Article 22 of the Constitution. It is specifically provided for under Article 23(3) of the Constitution. This position is a major departure from that of the old Constitution, at least as expounded by *Justice Nyamu (as he then was)* in the case of **Republic v Chief Justice of Kenya & 5 Others [2005] eKLR**, and categorically said that he could not issue judicial review on an order by the President because judicial review was not provided for in the Constitution but in an Act of Parliament. Without saying much, the said case and the reason for the decline by the judge to issue judicial review is distinguished. That reasoning will not therefore apply *mutatis mutandis* on the instant case where circumstances are clearly different.

The two tier test

[17] Is the power exercised herein derived from the Constitution and statutes? What is the nature of the power that was exercised? Nzoia Sugar Company Limited is a state corporation. Appointment of the Chairman of the Nzoia Sugar Company Limited is done by the President pursuant to provisions of the

Constitution, and specifically under section 6(1) (a) of the State Corporations Act. The President therefore exercised a public function and made a determinative decision of appointing the 4th Respondent thereby terminating the appointment of the ex parte Applicant.

Appointment and revocation of the Chairman of the Board

[17] What does section 6 of the State Corporations Act provide on appointment and revocation of appointment of the Chairman of a state corporation? Appointment shall be:

...by name and by notice in the Gazette and shall be for a renewable period of three years or for such other shorter period as may be specified in the notice.

The appointment ceases if the appointee:

- a) *Serves notice for resignation*
- b) *Is absent without permission from relevant authority*
- c) *Is convicted of an offence and sentenced to imprisonment for a term exceeding six months or a fine exceeding two thousand shillings.*
- d) *Is incapacitated physically or mentally as not to perform his duties.*
- e) *Conducts himself in a manner that is inconsistent with his membership of the Board.*

Accordingly, the power is statutory and is a public function. It is therefore amenable to judicial review by the court.

[19] Whereas the Government, and in particular the President, is not accountable to the courts in respect of the decision it takes, it is, however, accountable for the legality of such decisions. A challenge as to the legality of a decision for being in contravention of the law, should not be confused for challenge of the merits of the decision. Such distinction between judicial review and merit review should be made for one to understand the principles the court applies in judicial review.

[20] What is being challenged herein is the legality of the decision by the President to appoint the 4th Respondent while the ex-parte Applicant was still in office. Was it a lawful exercise of legitimate statutory power under the State Corporation Act? Let me say that if a duty is cast upon the President under the provisions of section 6 to *appoint* the Chairman of the Board of State Corporation, the integrity of that decision making process should ensure that the power is exercised for the purposes of and in the manner envisaged by the said Act. Exercise of the power in any other manner will have no existence in the eyes of the law. But I repeat, that this judgment is strictly confined to the legality of the decision by the President to appoint the 4th Respondent as contained in Gazette Notice No.8003 of July 2011.

Purpose and objects of State Corporations Act

[20] Section 6 (1) (a) of the State Corporation Act gives the President power to appoint the Chairman of the Board. But section 6 (2) of the said Act circumscribes the removal of a chairman who has been duly appointed by the President under section 6 (1) (a), which should be by revocation by name, on notice in a gazette and on reasons provided under the Act. This process is provided for under the law in order to avoid arbitrariness in appointment and removal of the chairman of the Board as a matter of law as well as for efficient running of the enterprise. That is why section 6 and 7 of the State Corporations Act specify certain major reason that should inform the decision to revoke an appointment of the Chairman of the Board. Even under section 7 of the Act, it is a good reason *if at any time it appears to him [the President] that the Board has failed to carry out its functions in the national interest, revoke the appointment of any member and may himself nominate a new member for the remainder of the period of office of that member....* But this is besides the point and is only aimed at emphasizing the intention that

the law must be followed the way it has prescribed. The court's main concern in judicial review is not the merits of the decision but the legality of the process used in appointing the 4th Respondent, thereby effectively terminating or purporting to terminate the appointment of the ex-parte Applicant.

[21] The State Corporations Act has been tailored in a manner that is constitutional in the sense that it allows some due process and fair administrative action particularly in a situation where revocation of a person's appointment is in issue. That process requiring the President to revoke a person's appointment is critical aspect of due process and a constructive satisfaction of the law. A court of law shall not hesitate to nullify an "appointment" that violates the letter and spirit of the law, although being careful not to enter into the arena of the merit review of the decision made by the person of the President who is the constitutionally mandated state officer to make such appointments. See **Constitutional Petition No.101 of 2011 Kenya Youth Parliament v Attorney General & Others and Constitutional Petition No.102 of 2011 Fida v AG & Another**. Therefore where the process of law is followed, the Court shall not have any jurisdiction to inquire about the merits of the decision, but where the process was not followed, the court has jurisdiction to engage into the process review under judicial review jurisdiction. But all these will depend on the nature of the case, the particular evidence produced and the peculiar circumstances of the case if they point at a violation of the law in the process adopted in making the decision. See **Democratic Alliance v the President of the Republic of South Africa & 3 Others (2011) ZASCA 241**.

CONCLUSION

[21] From the foregoing, I am not persuaded by the argument that because a sitting President enjoys immunity from legal proceedings under article 143 of the Constitution, no proceedings in the nature of public remedy should commence to put right a clear violation of the law in the exercise of a public power by the President. The public power herein is derived by the President from the Constitution and statute law as delegated by the people. Judicial review being a public law remedy is available in the Constitution to ensure due process has been followed, and it will not suffer ineffective because the impugned exercise of public power was committed by the President. Such proceedings where it is claimed a state officer acted in contravention of the law are in the nature of Constitutional remedy under article 22 and 23 of the Constitution, and are legally instituted and maintained against the Attorney General unless the Constitution or an Act of Parliament governing the particular state office provides otherwise, or where liability is of a criminal nature. These proceedings are not proceedings against the President but against the State itself and any ensuing liability would certainly be liability of the State within the public law of the State. The Attorney General is not sued on vicarious liability but under Article 156 (6) as the defender of the rule of law and public interest. The Constitution recognizes the role and jurisdiction of the High Court to protect the Constitution. Article 165 (3) (d) (ii) provides:

165. (3) Subject to clause (5), the High court shall have –

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of–

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

Appointment illegal

[22] It is without any doubt that there was no revocation by the President of the earlier appointment of the ex-parte Applicant as the Chairman of the Nzoia Sugar Company Limited as required by the State Corporations Act. It is not therefore legally possible for the President to have appointed another person to the same office before it has fallen vacant in accordance with the law; either on resignation or on expiry of tenure, or on revocation by the President. For emphasis. the office of the Chairman would have fallen vacant by revoking the appointment of the ex-parte Applicant first. Then it would have been available for another person to be appointed by name and notice in the Gazette under the State Corporations Act. The upshot of these is that the appointment of the 4th Respondent was in total violation of the law which completely takes away its legality. Accordingly the appointment is hereby quashed.

[11] As courts should not unnecessarily create impediments to the smooth running of State Institutions, and in the spirit of article 259 of the Constitution which propagates the principle that the law should be seen as always speaking, and in the national interest that Nzoia Sugar Company Limited shall not be paralyzed by this decision, I hereby order that this ruling be served on the A-G to accordingly advise the Government on the purport of the ruling and to take such legal measures as are necessary to obviate any absurdity that could be avoided. To this end, I order that this ruling shall take effect on expiry of 30 days from the date of the ruling. This is a practice that is common and permissible in a civilized system of courts within the concept of separation of powers.

Dated, signed and delivered in open court at Bungoma this 15th day of April, 2013

F. GIKONYO

JUDGE

In the presence of:

Mr. Murunga for Kiarie Advocate for the 3rd and 4th Respondents

No appearance for the 1st and 2nd Respondents

No appearance for Applicant
Kibellion holding brief for AG
Khisa for Court Assistant.

F. GIKONYO

JUDGE