



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
MISC. APPL. JR NO. 301 OF 2013

BETWEEN

ALI ISMAIL BARAKI.....1ST APPLICANT

MOHAMED ADAN KARBAT.....2ND APPLICANT

AND

**THE CHAIRMAN, GARISSA COUNTY PUBLIC SERVICE BOARD.....1ST
RESPONDENT**

THE GOVERNOR GARISSA COUNTY.....2ND RESPONDENT

**THE CABINET SECRETARY INCHARGE OF DEVOLUTION.....3RD
RESPONDENT**

THE TRANSITIONAL AUTHORITY.....5TH RESPONDENT

RULING

The Garissa Proceedings

1. The origin of this matter can be traced to a petition filed at the Garissa High Court namely ***Garissa Petition No. 8 of 2013 (Abdiwahab Abdullahi Ali v Governor, County of Garissa, Attorney General and Clerk, County Assembly of Garissa)***. In a nutshell, the petitioner prayed for a nullification and or invalidation of the list of nominees for the County Service Board (“the Board”) on the grounds that various provisions of the Constitution were violated in the process of nominating members of the Board.
2. On 18th July 2013, Mutuku J., after hearing the petitioner *ex parte* granted a temporary order staying the forwarding of the list of nominees to the Board to the County Assembly of Garissa for approval pending *inter-partes* hearing of the application on 25th July 2013. In the meantime Ali Ismail Baraki and Mohamed Aden Karbat applied to be joined to the petition as interested parties. On 25th July 2013, when the parties appeared before Mutuku J., she directed that, “*The application for the intended interested parties will be held in abeyance pending the hearing and*

determination of the preliminary objection. The court will direct how to proceed.” The matter was then scheduled for hearing on 26th August 2013.

Application for Judicial Review

3. The proceedings in this matter were commenced by a Chamber Summons dated 16th August 2013, when the applicants, Ali Ismail Bakari and Mohammed Adan Karbat (“the *ex-parte* applicants”), moved this court applied for the following orders:

1. *THAT the Application is hereby certified as urgent and service thereof is dispensed with in the first instance.*
2. *THAT leave be granted to the Applicants to apply for an Order of Certiorari to remove into the High Court for purposes of it being quashed the decisions of the County Assembly of Garissa on the 18th day of July 2013 purportedly approving the names of county public service board when there was a valid court order by the Honourable Justice S.S. Mutuku stating the forwarding of the list of nominees which order was duly served but contemptuously ignored by the following as members of the County Public Service Board:*

Harun Mohamed Yussuf-chairman

Annette Wambui Muriuki-secretary

Abdisalam Sheikh Mohamed-member

Mohamed D. Yusuf-member

Fardosa Abdikadir-member

Abdirizak Said-member

Mohamed Ibrahim Abdi-member

3. *THAT leave be granted to the Applicants to apply for an order of certiorari to remove into the High court for purposes of being quashed the decisions of the County Governor in appointing and gazetting the aforesaid names of the members of the County Service Board contained in Kenya Gazette Notice No. 10158 of 23rd July 2013.*
 4. *THAT leave be granted to the Applicants for an Order of prohibition directed at the Garissa County Public Service Board members from assuming office or discharging any functions whatsoever under that office pending the hearing and determination of the substantive application by the applicants.*
 5. *THAT leave be granted to the Applicants for an Order of prohibition against the 1st, 2nd and 3rd respondents from short listing, interviewing and or appointing any person as per the advertisement in the Sunday Standard of the 4th August 2013 pending the hearing and determination of this application.*
 6. *THAT leave be granted to the Applicants for an Order of Mandamus directed at 2nd and 3rd respondents to restart the process of appointment of the Garissa County Public Service Board by following due process of the law.*
 7. *THAT grant of leave hereby operates as a stay of the newspaper advertisement Sunday Standard of the 4th August 2013 calling for applications by the Garissa County Public Service Board, short listing, interviewing and or appointment of any persons pending the hearing and determination of the Applicant’s substantive application or until the Honourable Court otherwise directs.*
4. Odunga J., after hearing the *ex-parte* applicants, granted leave and ordered that leave do operate as a stay as prayed in the Chamber Summons. The matter was fixed for directions and further orders on 26th August 2013.

The application for review

5. The application for consideration is the Notice of Motion dated 19th August 2013 filed by the 1st, 2nd and 3rd respondents and it seeks the following orders;

[2] THAT the Honourable Court be pleased to review, vacate and or vary the *ex-parte* orders made on 16/8/2013 by Hon. Justice G. V. Odunga.

[3] THAT the Honourable Court do order that the matter be struck out and or transferred to the High Court in Garissa.

6. The respondents contend that the application is an abuse of the court process in light of the existing proceedings in the Garissa High Court.

Determination

7. I have heard all the parties' arguments and I conclude that this matter is an abuse of the court process for several reasons.
8. First, the parties to this matter are the same as those in the Garissa case. It is true that the *ex-parte* applicants in this matter are proposed interested parties in the Garissa petition as their application to join the petition has not been granted and has been held in abeyance. But as the learned Judge has already heard them and made an order on their application, they are effectively part of those proceedings pending a final determination. They cannot invoke parallel proceedings to deal or litigate the same issue which they would raise in those proceedings and which I now deal with as the second point.
9. The subject matter of the litigation in both cases concerns the constitution of the Garissa County Public Service Board. It does not matter that the prayers in this case are framed differently or that a different stage of the process of appointment is contested. The matter is to be approached as one of substance and not form and it is difficult for one not to conclude that the issue in both cases concerns the Board. In any case, the primary allegation that the *ex-parte* applicants raise is that the appointments proceeded in violation of the court order issued by Mutuku J. The *ex-parte* applicants are therefore debarred from litigating in a different forum what they had began to do in the Garissa High Court.
10. Third, this matter is a collateral attack on the orders of Mutuku J., issued on 25th July 2013 directing that the *ex-parte* applicants' joinder application in Garissa High Court be held in abeyance. To permit this judicial review application to proceed further is to undermine what Mutuku J., directed that she will consider on 26th August 2013. This cannot course of proceedings cannot be permitted.
11. Fourth, this judicial review matter is in the nature of contempt proceedings as evidenced by prayer 2 for leave. Whether there has been breach of the orders issued by the Garissa High Court is a matter to be taken in the existing suit. An allegation of contempt of court is to be dealt with by the court that issued the order and not by filing a separate application for judicial review such as the one pending determination in this case. Mr Nzaku, who acts for the *ex-parte* applicants in the Garissa matter, stated from the bar that he filed a contempt application being **Garissa Misc. No. 10 of 2013** which has now been consolidated with the petition. This suit in so far as it purports to re-litigate the order issued in **Garissa Petition No. 8 of 2013** is an abuse of the court process.

Disposition

12. All I have stated goes to show that this matter is an abuse of the court process. It may lead to different conflicting orders and as a result embarrass the court and bring justice in disrepute.

13. A suit that is an abuse of the court process cannot be permitted to sully the court rolls and no purpose will be served by transferring it to Garissa. It must be struck out and is hereby struck out. The respondents shall have the costs of these proceedings.

DATED and DELIVERED at NAIROBI this 21st day of August 2013.

D.S. MAJANJA

JUDGE

Mr Kibungei instructed by Kibungei and Company Advocates for the ex-parte applicants.

Mr Mogaka instructed by Musyoki Mogaka and Company Advocates for the 1st, 2nd and 3rd respondents.

Mr Mohammed, Litigation Counsel, instructed by the State Law Officer for the 4th respondent.

Mr Ogutu instructed by Mwaura and Wachira Advocates for the 5th respondent.

Mr Nzaku instructed by Nzaku and Nzaku Advocates for the proposed interested parties in Garissa HC Petition No. 8 of 2013