



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

JUDICIAL REVIEW. NO. 2 OF 2012

REPUBLIC APPLICANT

VERSUS

THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION RESPONDENT

EX PARTE

REUBEN OMBIMA ANJEYO

RULING

On the 9th of January, 2012 one **REUBEN OMBIMA ANJEYO**, moved this court by way of a chamber summons under Order 53 Rules (1), (2) and (4) of the Civil Procedure Rules seeking for leave to apply for judicial review orders of certiorari to bring into the High Court the decision of the Independent Electoral & Boundaries Commission (**IEBC**) to declare the office of the Secretary/Chief Executive Officer vacant and to call/invite application for the same, an order of prohibition, prohibiting **IEBC** from declaring the said office of the Secretary/Chief Executive Office vacant and/or in any way interfering with the unexpired period of the current Secretary/Chief Executive Officer, he also sought to have leave to operate as a stay of the decision, the contents, substance, purport and operation of the advertisement pending determination of the substantive motion.

This court granted leave, and allowed the said leave to operate as a stay. The said court order issued on the 10th of January, 2012 is the genesis of the current application by the respondent/applicant **IEBC** which application is by way of a Notice of Motion dated the 18th of January, brought pursuant to Order 51 rule 1 & 15, Order 53, Rules 1A, B, 3A & 63(e) of the Civil Procedure Act. The application seeks for the following orders:-

1. This Honourable court be pleased to certify this application urgent in the first instance.
2. Service of this application be dispensed with in the first instance for reasons of urgency.
3. That pending the hearing and determination of this notice of motion, this Honourable court be pleased to set aside, vacate and/or discharge order number 4 of the orders issued by this honourable court on 10th January, 2012 directing that the leave granted shall operate as stay of the decision, the contents, the substance, purport and operational of the advertisement by/ of the Independent Electoral and Boundaries Commission.
4. That pending the hearing of the proceedings herein, this Honourable Court be pleased to set aside, vacate and/or discharge order number 4 of the Orders issued by the Honourable court on 10th January, 2012 directing that the leave granted shall operate as stay of the decision, the contents, the substance, purport and operations of the advertisement by/of the Independent Electoral and Boundaries Commission.
5. This Honourable court be pleased to make any such order as may be fit and just in the interest of justice.
6. The costs of this application be provided for.

Prayers 1, 2, & 3 are now spent. For determination are prayers 4, 5 & 6 above. The application is supported by the affidavit of **Mohamud Mohamed Jabane** sworn on 18th January, 2012 and on the grounds on the face of the application as follows:-

- a) The Independent Electoral and Boundaries Commission Act, 2011 (hereinafter "the I.E.B.C Act") breathes life into and operationalises Article 88 of the Constitution of Kenya, 2010 by which the Independent Electoral and Boundaries Commission (hereinafter "the Commission") is established.
- b) The enactment of the I.E.B.C Act rendered defunct the Interim Independent Electoral Commission (hereinafter the "former Commission") which had been established under Sections 41 and 41A of the former Constitution by virtue of Section 28(1) of the Sixth Schedule to the Constitution of Kenya, 2010 except for the tenure of the Chairman and Commissioners to the former Commission who would continue in office until a Chairperson and Commissioners of the I.E.B.C were appointed.
- c) Upon the commencement of the I.E.B.C Act on 18th July 2011, the Chairman and the Commissioners thereto, after undergoing due process, were appointed by his Excellency the President in a Gazette Notice dated 9th November, 2011 and sworn into office by the Honourable the Chief Justice on 14th November, 2011.
- d) Both the Constitution, 2010 and the I.E.B.C Act expressly provide for the appointment of a Secretary to the Commission.
- e) The aforesaid appointment of JAMES OSWAGO as the Chief Electoral Officer was a contractual appointment between him and the former Commission and there is no privity of contract between the ex parte applicant and the former Commission.
- f) The applicant failed to make material disclosure to this Honourable court that the former Commission appointed Mr. James Oswago as the Chief Electoral Officer and not as Secretary to the former Commission as there was no such provision in the former Constitution or any other legislation and neither was the office of Secretary to the former Commission since there was no such office created by the former Constitution.
- g) The person on whose behalf the current proceedings have been instituted, Mr. James Oswago, was appointed as Chief Electoral Officer of the former Commission on 4th January, 2010 for a period of 5 years.
- h) Section 31(1) of the Sixth schedule to the Constitution saves only those offices that were established under the former Constitution of Kenya and the office of the

Chief Electoral Officer is not one such office.

- i) The contract between the former Commission and Mr. James Oswago was a personal contract between the former Commissioner and the Chief Electoral Officer of the former Commission and the doctrine of privity of contract prohibits third parties from instituting a suit founded on a contract to which they are not parties
- j) The Commission, upon its establishment, held its first plenary meeting on 23rd November, 2011 in which it resolved to appoint Mr. James Oswago as the Acting Commission Secretary/Chief Executive Officer for a period of three months under the same terms of service as he was serving in the contract for his appointment as the Chief Electoral Officer by the former Commission, pending the recruitment of a substantive Commission Secretary under Article 250(12) of the Constitution and Section 10 of the I.E.B.C. Act.
- k) Further to paragraph (i) above, the Commission held another meeting on 17th December, 2011 at which it resolved to advertise the positions of Commission Secretary/Chief Executive Officer and 2 Deputy Secretaries.
- l) Mr. James Oswago was therefore formally appointed in an acting capacity as Commission Secretary for a period of 3 months with effect from 8th November 2011.
- m) Mr. Oswago has not made any formal complaint or objection to the Commission either on his appointment as Acting Secretary or on the advertisement for the aforementioned positions in the local dailies.
- n) There is no provision in the advertisement that bars Mr. James Oswago from applying for the position of Commission Secretary and he may well apply and qualify for appointment as Commission Secretary and he may well apply and qualify for appointment as Commission Secretary and in the event that he does not qualify for appointment, the Commission undertakes to respect the provisions of the contract appointing him as the Chief Electoral Officer to the former Commission.
- o) The appointment of Mr. James Oswago as the acting Secretary of the Commission expires on 8th February 2012 after which the Commission will not have a substantive Secretary and which will hamper the operations of the Commission.
- p) The effect of the said Order Number 4 issued by this Honourable Court on 10th January 2012, is to restrain the Respondent indefinitely from performing its duties under the Constitution and the I.E.B.C Act since there is no returnable date for the hearing of the Notice of Motion which is to be filed by the ex parte applicant within 21 days from the grant of leave.
- q) This Honourable Court was misled into granting order number 4 on the sole basis that James Oswago held office under Section 41(10) of the former Constitution which is not the case.
- r) The position of Chief Electoral Officer to the former Commission has neither constitutional underpinning in the former Constitution which created the former Commission nor any statutory underpinning to justify the invocation of public law remedies.
- s) Unlike the former Commission as established by the former Constitution, the position of Secretary to the Commission is anchored in both the new Constitution and the I.E.B.C Act and as such it has both constitutional and statutory underpinning.
- t) The present proceedings raise matters of a purely contractual/employment nature whose recourse is not within the purview of judicial review proceedings, as there is no constitutional or statutory underpinning as earlier stated and as such any aggrieved person can only seek recourse in the manner provided under employment law legislation.
- u) The ex parte applicant has not given any evidence of misinterpretation of the provisions of the Constitution by the Commission; but in the event that there is a conflict in the Constitution, which is denied, resolution of such conflict is to be done by the High Court under its interpretation jurisdiction provided for under Article 165(3) (d) of the Constitution and not by way of judicial review proceedings as attempted by the ex parte applicant herein.
- v) The advertisement by the Commission for the position of Commission Secretary/Chief Executive Officer was done in the spirit of Article 232(1) (g) of the Constitution of Kenya and Section 10 of the I.E.B.C Act which provides for fair competition and merit as the basis of appointments as one of the values and principles of public service.
- w) The balance of convenience is in setting aside the ex parte order number 4 issued by this Honourable Court on 10th January, 2012 and setting a date for the inter partes hearing.
- x) To allow the aforesaid order number 4 to stand would destabilize the programme prepared by the Commission and thereby threaten the smooth conduct of the forthcoming General Elections within the time frame prescribed by the Constitution.

In his affidavit **Mr. Mohamud Mohamed Jabane** word for word reiterated the above grounds.

The application was objected to by the ex parte applicant in an affidavit dated 20th January, 2012 whose contents may be summarized as follows; that the current Secretary of **IEBC** is a Constitutional office holder and his office is protected under Section 31(1) of the Transitional and Consequential provisions in the 6th schedule to the Constitution, 2010; that the actions of **IEBC** in regard to the secretary is against the letter, spirit and intentions of the Constitution and in breach of Articles 259 of the same; that Section 9(1) of the **IEBC Act** (Act No. 9 of 2011) is in contravention of the Transitional and Consequential provisions set out in the 6th schedule to the Constitution; the actions of **IEBC** are based on misrepresentation of the Law; the wrong Principles of Constitutionalism and a breach of trust; the process of arriving at the decision was irregular; maimed with impropriety, skewed, lopsided and not in the interest of the electorate; lastly that the Chief Electoral Officer enjoys provisions of Sections 31(1) 33 & 34 of the Transitional and Consequential Provision of the Constitution.

At the hearing of the application **Mr. Kilonzo** for the **IEBC** argued that the order must be vacated as there was gross misdirection in the issuance of the same; that the acting Secretary of **IEBC** was initially appointed as a Chief Electoral Officer not as a Secretary to the Commission; under the old law and vide a letter dated 4th January, 2010, and in its meeting of the 16th of December, 2011 following deliberations of the Commission, the Chief Electoral Officer was appointed for a period of 3 month in an acting capacity, the said officer has not raised a finger and has indicated willingness to serve as such and therefore, an enthusiastic voter meaning the *ex parte* applicant cannot come to court as there exists a contract between the said acting secretary and **IEBC**; that they was fraud visited upon the court and counsel therefore urged for a discharge of the order of stay.

Mr. Onsongo and **Mr. S. Onyango**, argued in the opposition. They contended that Article 47 of the Constitution gave the *ex parte* applicant the right to complain; that Section 49(10) of the old Constitution (2008 Edition) allowed the hiring of the chief Electoral Officer and as such he is a Constitutional office holder; that Section 31(1) & (2) of the new Constitution protect the said office; further that the letter of appointment was for 5 years and therefore the terms remain and **IEBC** cannot do away with the old contracts, contracting the Chief Electoral Officer as an acting Secretary, only for 3 months is unconstitutional, that **IEBC** has not complained that the said individual is incompetent or not performing, lastly they urged that the applicant/respondent has not demonstrated that the court order will ground the institution to a halt, the institution is functional, they urged the court to decline the prayers being sought.

In his response **Mr. Kilonzo** referred the court to Article 88 of the new Constitution, he argued further that **Mr. Oswago** is neither a statutory nor a constitutional office holder although he may be referred to as a public officer, S. 31 of Transitional Clause did not save his office and neither has he been dismissed as Chief Electoral Officer.

Having considered the rival submission I cannot but observe the vigor and enthusiasm with which counsel on both sides tried to sway the court in their favour. Parties have said a lot both in their pleadings for and against the application and have submitted at length. I dare say that the issue before me is simply whether to vacate the order of stay or not and to do so I must consider whether the *ex parte* applicant had made out a prima facie case or still has a prime facie case or not. Most of the issues and points brought forth by the parties in their argument go to the merit of the substantive Notice of Motion which has since the 31st of January, 2012 been filed.

In the ruling of the 10th of January, 2012 this is what the court said in part.

“The applicant as a Kenyan citizen has a right to move this court in the manner he has. At this stage he has to prove that he has a prima facie case/or an arguable case before court. He has argued breach of the Constitution namely Articles 2, 3, 12(1), 22, 23, 47, 48, 50 & 258; Sections 28, 31(i) and 33 of the Transitional and Consequential Provisions. This is a matter of immense National Interest no doubt. The applicant is aggrieved and on the face of the application I find that he has an arguable case and he ought therefore to be given an opportunity to ventilate his case ---“

It is clear that the court did not go into the merit of the case and that I maintain at that stage was the right thing for this court to have done. I maintain still that for the current application I need not go into the merits of the case as time is not ripe for that. The position taken by this court was enunciated in the case of **Njuguna VS Minister for Agriculture (2000)**, E. A at P. 184 where the court held;

“The test as to whether leave should be granted to an applicant for judicial review is whether, without examining the matter in any depth, there is an arguable case that the reliefs might be granted on the hearing of the substantive application ---“

This court granted leave and went ahead to grant the next prayer, for the leave to operate as a stay. The court is being asked to discharge the leave. Several grounds have been cited as herein above stated. In issuing the stay the court considered whether there was a prima facie case, secondly whether without stay the ex parte applicant’s case would be rendered nugatory. For consideration now is whether the circumstances as demonstrated by the *ex parte* applicant at the time of hearing his *ex parte* application, he deserved a stay and whether the same has since changed.

In **Republic V Registrar of Companies ex parte Githongo** (2001) KLR at 299. **Bauni J** as he then was said in part:-

“The grant of a stay under order LIII rule 4 of the Civil Procedure Rules is discretionary. In exercising this discretion, the court must be satisfied that the applicant has *locus standi* and the circumstances of the case warrant the granting of the stay applied for.”

In **Taib A. Taib V Minister for Local Government & 3 others** (2006) eKLR. **Maraga J** as he then was stated

“That this court has jurisdiction to grant orders of stay has never been in issue given the provision of Order 53 rule 1(4) what is always in issue is whether, in the circumstances of any particular case, a stay order is efficacious.

I also want to state that in judicial review applications like this one 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. Therefore where the order of stay is efficacious the court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that stay orders are discretionary and their scope and purposes is limited. What then is the scope and purpose of stay orders in the judicial review jurisdiction?

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. It is not limited to judicial or quasi – judicial proceedings as some think. It also encompasses the administrative decision making process (if it has not yet been complete) being undertaken by a public body such as a local authority or Minister and the implementation of the decision of such body if it has been taken. A stay is only appropriate to restrain a public body from acting.”

The *ex parte* applicant sought for leave to operate as stay of the decision, the contents, substance and operations of the advertisement by the respondent. The advertisement relevant to this application related to the office of the Secretary to the Commission. It is my view that in the circumstances of the case if the stay is lifted the *ex parte* applicant’s substantive motion which has since been filed will be rendered nugatory.

For the avoidance of doubt the stay granted by this court was not in regard to the other positions namely Deputy Commission Secretary (operations) & Deputy Commission Secretary (support services) but that of the Secretary to the Commission which then means that the Commission may proceed to continue with the hiring process of the deputies.

For the above reasons the application is dismissed. Costs of the same to abide the outcome of the case.

This being a case of much national interest and taking cognizant of the fact that the matter needs to be expedited I hereby direct the *ex parte* applicant files and serves his skeleton submissions and list of authorities within the next 7 days of the date hereof, the respondent files and serves its submissions and list of authorities within 7 days upon service and hearing date to be agreed upon forthwith.

DATED AND DELIVERED THIS 16TH DAY OF FEBRUARY, 2012.

**ALI-ARONI
JUDGE**

In the presence of:

..... present for Applicant

.....present for Respondent