



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW 1294 OF 2007**

**BENJAMIN SHAMALA IMBOGO .....APPLICANT**

**VERSUS**

**MINISTER FOR AGRICULTURE .....1<sup>ST</sup> RESPONDENT**

**SAULO WANAMBISI BUSOLO CHAIRMAN KENYA SUGAR BOARD .....2<sup>ND</sup> RESPONDENT**

**ROSEMARY MKOK ACTING CEO, KENYA SUGAR BOARD .....3<sup>RD</sup> RESPONDENT**

**KENYA SUGAR BOARD .....4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL .....5<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

Benjamin Shamala Imbogo is the applicant in these proceedings. The applicant's prayers are captured by the notice of motion dated 5<sup>th</sup> February, 2008 as:-

- (a) An order of certiorari to remove into the High Court and quash Gazette Notice No. 12116 contained in the Kenya Gazette issue of 14<sup>th</sup> December, 2007 revoking the appointment of the applicant BENJAMIN SHAMALA IMBOGO as a member of Kenya Sugar Board.**
- (b) An order of prohibition barring or prohibiting each and all the respondents from stopping and restraining the applicant from the exercise of his office, functions, duties and powers as a member and director of Kenya Sugar Board.**
- (c) An order of prohibition barring or stopping the 1<sup>st</sup> respondent from appointing, calling for election in place or instead of the applicant or a representative of the West Kenya Sugar Board.**
- (d) That cost of this application be borne by the respondents.**

The application is supported by the statutory statement dated 20<sup>th</sup> December, 2007 plus a verifying affidavit sworn by the applicant on 24<sup>th</sup> December, 2007.

The grounds upon which the reliefs are sought as found in statutory statement are:-

- (a) That after his election by sugarcane farmers in West Kenya Sugar Zone, the applicant**

**BENJAMIN SHAMALA IMBOGO** was then duly appointed by the Minister for Agriculture by a Kenya Gazette issue of 3<sup>rd</sup> June, 2005 as per Section 5(1) b of the Sugar Act 2001 for a term of three (3) years, yet to expire in June, 2008.

**(b) That in Gazette Notice No. 12120 contained in the Kenya Gazette Notice issue of 14<sup>th</sup> December, 2007, the Minister for Agriculture revoked the appointment of the applicant as a member of Kenya Sugar Board with effect from 9<sup>th</sup> November, 2007.**

**(c) That the Minister for Agriculture acted irregularly when he issued the said Gazette No. 12120 under Section 6(2) of the State Corporations Act instead of Rule 1 First Schedule of the Sugar Act 2001.**

**(d) That in any event, the Minister overreached (ultra Vires) the perimeters set out in Section 7 and in Rule 1 First Schedule Sugar Act 2001 or as well as Section 6(2) of the State Corporations Act if it applies.**

**(e) That the revocation of the applicant's membership with Kenya Sugar Board was not exercised within the grounds laid down in Rule 1 First Schedule Sugar Act 2001 and even Section 6(2) of the State Corporations Act if at all it applies.**

**(f) That the applicant has neither committed the acts or been in circumstances provided for both in section 6(2) of the State Corporations Act and Rule 1 First Schedule of the Sugar Act 2001 and his revocation irregular.**

**(g) The Minister equally failed to observe rules of natural justice in that he never gave the applicant notice of the allegations against him and invited his comment.**

**(h) That the Minister having acted ultra vires, without evidential foundation, ignorance of the law and rules of natural justice – errors so glaring as to constitute breach of duty to act in good faith in exercising any of his powers under the Sugar Act.**

**(i) That the Minister's act is in revenge for Applicant's institution of High Court Civil Miscellaneous application Number 361 of 2006 – Republic Vs. Minister for Agriculture Ex-parte BENJAMIN SHAMALA IMBOGO seeking review of the appointment of the 2<sup>nd</sup> respondent as Chairman of the Kenya Sugar Board.**

**(j) That the applicant having been elected to represent growers' interest in West Kenya Sugar Zone, this arbitrary removal violated the principle of legitimate expectation held by the applicant as well as other growers of sugarcane in the zone that the Minister would adhere to the principles of governance and participation by stakeholders.**

**(k) The applicant being an elected member of the Board of Directors of Kenya Sugar Board, can only vacate office under the reasons stipulated in Rule 1 of the 1<sup>st</sup> Schedule of the Sugar Act No. 10 of 2001.**

**(l) Other and further grounds as contained in the affidavit of BENJAMIN SHAMALA IMBOGO.**

The Minister for Agriculture; Saulo Wanambisi Busolo the Chairman, Kenya Sugar Board; Rosemary Mkok, Acting Chief Executive Officer, Kenya Sugar Board; Kenya Sugar Board; and the Attorney General are the 1<sup>st</sup> to 5<sup>th</sup> respondents.

The 1<sup>st</sup> and 5<sup>th</sup> respondents opposed the application on the grounds:-

**(1) THAT the application dated 5<sup>th</sup> February, 2008 is incompetent, misconceived and bad in law.**

- (2) THAT the court has no jurisdiction to grant the orders sought since the same have been overtaken by events.**
- (3) THAT Judicial Review a special jurisdiction of the court.**
- (4) THAT Judicial Review is discretionary in nature and orders sought can be declined even where they are deserved.**
- (5) THAT application is otherwise an abuse of the court process.**
- (6) THAT the verifying affidavit is incompetent for want of facts relied on.**
- (7) THAT there is no material of evidential value to support this application.**
- (8) THAT Judicial Review is concerned with the process and not with the merits.**
- (9) THAT Judicial Review is a public law remedy and not concerned with private rights.**
- (10) THAT the application contravenes Section 6(2) of the State Corporations Act Chapter 446 of the Laws of Kenya.**

All the parties filed submissions in response to the application. As can be seen from the submissions the respondents do not attack the merits of the application. They only argue that if the orders are granted they will not serve any purpose since the Gazette Notice that is being challenged has lapsed.

For the sake of good governance and the rule of law, I find it necessary to address the merits of this application. The applicant submits that the revocation of his appointment to the Kenya Sugar Board (hereinafter simply referred to as the Board) was ultra vires the provisions of the Section 7 and Rule 1 of the First Schedule of the Sugar Act, 2001 as well as Section 6 (2) of the State Corporations Act.

Section 7 of the Sugar Act provides that:-

**“7(1) the conduct and regulation of the business and affairs of the Board shall be as provided in the First schedule.**

**(2) Except as provided in the First schedule, the board shall regulate its own procedure and the procedure of any committees thereof.”**

The removal of a member of the Board from office is governed by Rule 1 of the First Schedule which provides that:-

**“A member of the Board, other than a chairman or an ex-officio member, may-**

- (a) at anytime resign from office by notice in writing to the Minister;**
- (b) be removed from office by the Minister if the member –**
  - (i) has been absent from three consecutive meetings of the Board without the permission of the Board;**
  - (ii) is convicted of a criminal offence and sentenced to imprisonment for a term exceeding six months or to a fine exceeding ten thousand shillings;**
  - (iii) is incapacitated by prolonged physical or mental illness; or**
  - (iv) is otherwise unable or unfit to discharge his functions.”**

Section 6(2) of the State Corporations Act provides that:-

**“Every appointment under subsection 1(a) and (e) shall be by name and by notice in the Gazette and shall be for a renewable period of three years or for such shorter period as may be specified in the notice, but shall cease if the appointee-**

**(a) serves the Minister with written notice of resignation; or**

**(b) is absent, without the permission of the Minister notified to the Board from three consecutive meetings; or**

**(c) is convicted of an offence and sentenced to imprisonment for a term exceeding six months or to a fine exceeding two thousand shillings, or**

**(d) is incapacitated by prolonged physical or mental illness from performing his duties as a member of the Board; or**

**(e) conducts himself in a manner deemed by the Minister, in consultation with the committee to be inconsistent with membership to the Board.”**

As can be seen from the quoted provisions, the Minister can only remove a member of the Board under certain circumstances. The 1<sup>st</sup> respondent has not told the court that at the time the applicant was removed any grounds for his removal, as per the law, existed. That means the applicant’s removal contravened the law.

The next question would then be whether the orders prayed for by the applicant should be granted. The applicant was appointed to the Board on 3<sup>rd</sup> June, 2005 for a term of three years. That term would have run its course by 2<sup>nd</sup> June, 2008 were it not rudely interrupted by the Minister. In fact the applicant was never replaced and his slot in the Board became vacate until the time the next elections were held. Issuing the orders sought will therefore not serve any useful purpose. Judicial review orders are discretionary in nature. They are issued to serve the ends of justice. They are never issued in vain. In this case the orders if issued will be issued in vain since nothing will be achieved by their issuance. I therefore agree with the respondents that the orders prayed for should not be issued.

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents submitted that they are not to blame for the de-gazettment of the applicant’s appointment. I agree with them. The applicant has however been put through unnecessary litigation as a result of the unlawful actions of the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent should pay for the blatant abuse of power. The applicant is therefore awarded costs against the 1<sup>st</sup> respondent. The 2<sup>nd</sup> to 5<sup>th</sup> respondents will meet their own costs.

**Dated and signed at Nairobi this 18th day of July , 2012**

**W. K. KORIR, J**