REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPL. NO. 97 OF 2011

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR CERTIORARI, PROHIBITION AND MANDAMUS

IN THE MATTER OF: SECTION 28,50 (10,232 AND 236B OF THE CONSTITUTION OF THE REPUBLIC OF KENYA; SECTION 3(1) AND (2), 5(3), 6(1) AND (2), 15(1) OF THE STATE CORPORATIONS ACT (CAP 446); SECTIONS 3(2) (3), 4, 7(1), (2), (3), (4), 8(1) AND SECTION 9 OF THE NATIONAL CAMPAIGN AGAINST DRUG ABUSE AUTHORITY ORDER, 2007 (LEGAL NOTICE 140 OF 2007)

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE PERMANENT SECRETARY OFFICE OF THE PRESIDENT MINISTRY OF STATE, PROVINCIAL ADMINISTRATION AND INTERNAL SECURITY.....1ST RESPONDENT

THE CHAIRMAN OF THE MANAGEMENT BOARD OF THE NATIONAL CAMPAIGN AGAINST DRUG ABUSE AUTHORITY .....2ND RESPONDENT

THE NATIONAL CAMPAIGN AGAINST DRUG ABUSE AUTHORITY .....3RD RESPONDENT

EXPARTE .....JENNIFER NYAMBURA KIMANI

AND

THE BOARD CAMPAIGN AGAINST DRUG ABUSE AUTHORITY.....INTERESTED PARTY

RULING

The Exparte Applicant, JENNIFER NYAMBURA KIMANI, has sought and been granted leave to institute substantive Judicial Review proceedings against the Respondents herein. The leave was granted on 21st April 2011.

My Learned sister, Mwilu J., whilst granting leave, ordered that the issue as to whether or not the leave so granted should operate as an order of stay of the 1st Respondent's orders and/or decisions made, or proceedings dated 25th October 2010, be argued *inter partes.*

The issue fell for decision before me.

When canvassing the issue, Mrs Ameka, the learned advocate for the Exparte Applicant (who shall hereinafter be cited as "the Applicant") submitted that her client got a letter on 26th October 2010, requiring her to vacate her office, and to proceed home. The letter, authored by the Permanent Secretary, Office of the President, Ministry of State, Provincial Administration and Internal Security, is dated 25th October, 2010.

As far as the Applicant is concerned, the issues she proposes to raise in the substantive proceedings were issues of public law, and were thus amenable to Judicial Review. Her reason for submitting that the issues are of public law is that the Permanent Secretary, (who is the 1st Respondent) had no power or authority, in law, to terminate the contract of employment between the Applicant and the 3rd Respondent (NACADAA).

It is the applicant's case that, in law, it is only the Minister who is the appointing authority. That power is vested in the Minister by **Section 7 (1) of The National Campaign Against Drug Abuse Authority order, 2007.**

Therefore, when the 1st Respondent wrote the letter complained about, the Applicant believes that he did so without authority.

Not only does the 1st Respondent lack authority, submitted the Applicant, but there was also no privity of contract between the said 1st Respondent and the Applicant.

Therefore, the Applicant believes that this court should enable her to return to her work, as what the Permanent Secretary did is said to be void *ab initio.*

In any event, as far as the Applicant was concerned, such powers as the Minister has, can only be exercised on the recommendations of the Board of NACADAA. In other words, the Minister had no discretion in the matter. And as the Board is said to have written to the Minister, notifying him that the Applicant's contract should be extended, the Applicant believes that that is what ought to happen.

The Permanent Secretary was a member of the Board that recommended the extension of the Applicant's contract. But thereafter, he is said to have acted in a manner that constituted an abuse of his power, when he wrote to the Applicant, instructing her to vacate her office.

In answer, Mr. Onyiso, learned state counsel, submitted that the Applicant had failed to demonstrate that she had a prima facie case with a probability of success.

The 1st Respondent submitted that he had made no decision which could be stayed. His role, in writing the letter dated 25th October 2010 is described as that of relaying to the Applicant, the decision of the Minister.

Secondly, the 1st Respondent submitted that the issues being complained about were nothing more than the contract between the Applicant and the 3rd Respondent. That being the position, as understood by the Permanent Secretary, he argued that Judicial Review was not applicable.

He understands the Applicant to be seeking a reinstatement to her position. And if that happened, the 1st Respondent contends that the court would have re-written the contract between the parties, after the contract had expired.

Thirdly, contended the 1st Respondent, the Applicant will not suffer irreparable harm if the leave granted to her did not operate as stay. That submission is premised on the ground that damages for breach of a contract are quantifiable in monetary terms.

Finally, the 1st Respondent said that it was in public interest to have a CEO for NACADAA, who was sourced for competitively. Therefore, the 1st Respondent said that the Applicant should have felt free to participate in that process of competitive sourcing, as she might succeed.

On their part, the 2nd and 3rd Respondents pointed out that the Replying Affidavit sworn by Dr. Frank Njenga, was sworn by the deponent in his capacity as the chairman of the Board of NACADAA.

Mr.Ligunya, the learned advocate for the 2nd and 3rd Respondents submitted that the Permanent Secretary only conveyed to the Applicant, a decision that had been made by the Minister. Therefore, as the decision being challenged had been made by the Minister, the 2nd and 3rd Respondents submitted that the failure to enjoin the Minister to these proceedings was fatal.

Secondly, it was pointed out that the letter complained about had been written many months before the Applicant moved the court. During all that time, the Minister could have shown that the decision being challenged was not his, if indeed that was

factually correct. As the Applicant has not exhibited anything to show that the Minister had disowned the decision, the 2nd and 3rd Respondents argued that that confirms that the decision had indeed been made by the Minister.

Thirdly, it was reiterated that the dispute was simply over a contract of employment. Therefore, those respondents submitted that, by dint of **sections 162 (2) and 165 (5) of the Constitution of Kenya, the High Court** has no jurisdiction over the matter.

I was told that the jurisdiction vested exclusively in the Industrial Court.

In any event, the contract had been for a specific duration, which lapsed on 22nd June 2010. Therefore, as the contract had not been renewed, there could not be a stay.

The Applicant is said to have received gratuity amounting to KShs.4,186,488, in July 2010. Therefore, the 2nd and 3rd Respondents say that that confirms the Applicant's acknowledgment, that the contract had lapsed.

In reply to the respondents, the Applicant submitted that where contracts have statutory underpinnings, they are amenable to Judicial Review. In this case, the appointing authority was specified by statute.

The applicant also said that there were no legal provisions for competitive sourcing of the CEO for NACADA. As far as she is concerned, the only lawful means of engaging the CEO is through a recommendation by the Board, to the Minister.

Finally, the applicant submitted that only a lawful termination of her contract, by the appointing authority, would terminate her stay in office.

In determining the only issue currently before the court, I note that most of the submissions made before me relate to the substantive issues.

For instance, whether or not the High Court has jurisdiction to hear and determine the dispute, is not for me to determine at this stage. The court has already granted leave to the Applicant to commence the substantive action. Of course, I am not suggesting that by so doing, the issue of jurisdiction has been determined. At the stage of the grant of leave, the Applicant was heard ex parte. Therefore, the issue of jurisdiction did not come up. It may now only come up when the substantive action has been instituted.

Secondly, whether the decision was made by the Permanent Secretary or the Minister, is also an issue that does not fall for determination at this stage.

So too, the issue as to whether or not the contract was determined by the Permanent Secretary; the Minister; or by effluxion of time.

I also consider that question as to whether or not the issue was amenable to Judicial Review, to be one that ought to be determined at a later stage.
It is common ground, as I understand it, that the contract between the Applicant and NACADAA had come to an end. It is for that reason that the Board is said to have recommended to the Minister that the Applicant's contract be extended.

The Applicant says that her office was taken over forcibly; and that Mr. Aggrey Busena was installed therein as the Acting National Coordinator/Chief Executive Officer.

When I asked Mrs Ameka advocate, what it would mean if the court ordered that the leave granted herein should operate as stay, the learned advocate told me that a stay would enable the Applicant to reclaim her office.

If a stay order would actually give effect to the reinstatement of the Applicant to her office, then that would not, in my considered view, constitute stay. I say so because in my humble understanding, an order of stay is akin to a restraining injunction, which stops the person it is directed at from doing the things specified in the order. An order of stay is not in the nature of a mandatory injunction which would require the party it is directed at to do the things specified in the order.

As the Applicant submits that it is only the Minister who has the legal authority to appoint the CEO of NACADAA; and because the Minister has not yet exercised that power, this court finds that it would be wrong of it, to impose the Applicant on NACADAA at this stage.

Currently, I cannot tell whether or not the Board will give some recommendation to the Minister after the competitive process of sourcing. Therefore, even if the Applicant is right, that a CEO can only be appointed through the recommendation of the Board, the fact that the sourcing has started through a competitive exercise is not necessarily a nullity as suggested by the applicant.

I therefore find no reason to give an interim order which will put on hold that exercise.

In the result, I find no good reason why the leave granted should operate as stay. This decision is partially influenced by the fact that the letter complained about was written about 5 months before these proceedings were commenced. During that period of time, the Board commenced the competitive sourcing for the CEO. The Board publicly advertised for that position in the local press, and the closing date for the receipt of applications was Friday 25th March 2011.

For the Applicant to ask the court to put on hold all that process, is not in public interest.

I therefore order that the leave granted to the applicant shall not operate as stay.

Dated, Signed and Delivered at Nairobi, this 27th day of May, 2011.

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FRED A. OCHIENG
JUDGE