



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Miscellaneous Application 361 of 2006

**IN THE MATTER OF AN APPLICATION BY BENJAMIN SHAMALA IMBOGO FOR
ORDERS OF CERTIORARI & PROHIBITION**

AND

IN THE MATTER OF THE SUGAR ACT, NO.10 OF 2001

AND

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CHAPTER 26 LAWS
OF KENYA**

BENJAMIN SHAMALA

IMBOGO.....APPLCIANT

VERSUS

- 1. KENYA SUGAR BOARD**
 - 2. CHIEF EXECUTIVE OFFICER, KENYA SUGAR BOARD**
 - 3. THE MINISTER FOR AGRICULTURE**
 - 4. THE HONOURABLE ATTORNEY GENERAL.....**
- RESPONDENTS**

JUDGMENT

Benjamin Shamala Imbogo, the ex parte Applicant herein, filed this Judicial Review application against the Kenya Sugar Board, hereinafter referred to as (KSB) the Chief Executive Officer KSB, The Minister for Agriculture and the Hon. The Attorney General, the Respondents herein. The Applicant seeks two prayers:-

(a) An order of certiorari to call into this court and quash the notice to convene proceedings and resolutions of the 70th Special Board Meeting of KSB held on 27/6/06 at Sukari Plaza Nairobi.

(b) The renewal of the employment contract of Andrew Oloo Otieno expiring on 30/6/06 as Chief Executive Officer, by the Chairman Kenya Sugar Board, be called up and quashed.

The application was opposed

The issues that seem to lend themselves for determination are:-

1. Whether the 70th Special Board Meeting of KSB was illegal;
2. Whether removal of Joseph Mbai and election of Saulo Wanambisi as Chairman of the Board was irregular;
3. Whether the meeting of 27/6/07 was held in contempt of the court's order.

The Notice of Motion is supported by the statement and verifying affidavit of Imbogo dated 29/6/06, and another affidavit of 24/7/06, submissions filed on 2/7/09 and list of authorities. The Notice of Motion was opposed and Mr. Menge filed grounds of opposition on behalf of the 3rd and 4th Respondents. Mr. Wati argued the motion on behalf of the Applicants. The 1st and 2nd Respondent filed submissions but did they appear at the hearing.

The Applicant describes himself as a Director of KSB representing Western Region. That the Board has 13 directors and for a special meeting to be called, it has to be requisitioned by five members and a 14 days notice be given to every member of the

Board. He received a notice of a meeting on 22/6/06, for a meeting to take place on 27/6/06. EXB I – I. It was issued by A.O. Otieno the Chief Executive Officer. He objected to the convening of the meeting by Otieno by letter of 22/6/06 addressed to the Permanent Secretary Ministry of Agriculture, Dr. Kiome and the Attorney General EX B I 2 A & B. It is because the Board had sent Otieno on leave on 25/5/06 and Ms. Mkok was acting in his place and in a meeting of 22/5/06 it had been that the Chief Executive Officer's contract would not be renewed. That at the time the notice was sent, the Chief Executive Officer was supposed to be on leave and that notice of meetings are ordinarily send by the company secretary. Mr. Mbai, the then Chairman confirmed to him that there had been no requisition for the special meeting. If no requisition was made, the meeting could have been called by agreement of $\frac{3}{4}$ of the Board members but the Chairman confirmed that they had. He proceeded to the venue of the meeting on 27/6/06 and at 11.55 a.m. Mr. Mbai called the meeting on order and indicated that he had received a court order issued by Kakamega **CM'S COURT IN CC 368/06 BENJAMIN IMBOGO SHAMALA V ANDREW OLOO OTIENO AND KSB** which was restraining the conduct of the meeting (EXBI 7). Mbai, Imbogo, Ms Kathere for Permanent Secretary and Gichara walked out of the meeting after Mr. Mbai called off the meeting. However, to their dismay, the other members including Benjo, Evans Kidero, Silvan Omenge stayed back and continued with the meeting chaired by Evans Kidero who was the Vice Chair. The Applicant contends that he confirmed that the court order had been served on Directors that day at 8.00 a.m. (EXBI 8). That the meeting of 14/6/06 never resolved to have a meeting on 27/10/06 and such resolution was a manipulation of the minutes. That the meeting of 27/6/06 was meant to scuttle the Board's resolutions of 22/5/06, refusing to renew the Chief Executive Officer's contract of employment as the Chairman had refused

to accede to it.

The grounds filed in opposition by the Respondent are to the effect that the application is misconceived and bad in law, based on the wrong procedure, It is an abuse of the court process and the court lacks the necessary jurisdiction to grant the orders.

Judicial review is a public law remedy by which the court exercises supervisory jurisdiction over public officers and public bodies to ensure that they act fairly in the discharge of their administrative duties. In **COMMISSIONER OF LANDS V KUNSTE HOTEL LTD CA 234/1995** the Court of Appeal explained the scope of Judicial Review and relied on the case of **CHIEF CONSTABLE OF THE NORTH WALES POLICE V EVANS (1982) 1 WLR 1155** where Lord Hailsham of Melbone said

“ The purpose of Judicial Review is to ensure that the individual receives fair treatment and not to ensure that the authority, after according treatment reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court.”

Judicial Review is therefore not concerned with private rights or the merits of the decision under challenge but with the fairness of decision making process. The KSB is creature of statute – i.e. S 3 of the Sugar Act 2001. S 3 reads:-

(1) There is established a board to be known as the Kenya Sugar Board.

(2) The Board shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name be capable of:-

(a) suing and being sued

(b) – d

(3)”

S 4 sets out the objects and functions of the Board. S 7 then provides for conduct of business and affairs of the board, as provided in the First Schedule. Rule 2 of the First Schedule provides for the conduct of meetings.

It reads as follows:

“2. (1) The Board shall meet not less than four times in every financial year and not more than four months shall lapse between the date of one meeting and the date of the next meeting.

(2) Notwithstanding the provisions of subparagraph (1), the chairman may, and upon requisition in writing by at least five members shall, convene a special meeting of the Board at any time for the transaction of the business of the Board.

(3) Unless three quarters of the total members of the Board otherwise agree, at least fourteen days’ written notice of every meeting of the Board shall be given to every member of the Board.

(4) The quorum for the conduct of the business of the Board shall be seven members.

(5) The chairman shall preside at every meeting of the Board at which he is present but in his absence, the vice-chairman shall preside and shall, with respect to that meeting and the business transacted thereat, have all the powers of the chairman.”

Being a public body, the KSB is subject to supervisory jurisdiction of this court by way of Judicial Review. The notice calling for the 70th meeting of KSB of 27/6/06 indicates that it was a Special Meeting of the Board (EXB I 1). The notice is dated 19/6/06 and the meeting was for 27/6/06. R 2 (2) of the First Schedule cited above clearly provides

that notice for a special Meeting is 14 days. The notice calling for the meeting of 27/6/06 was therefore irregular as it was for only 8 days. There is also no evidence that there was a requisition of the meeting because the notice is vague as it does not indicate who requisitioned for the meeting. The 14 days notice can be dispensed with if $\frac{3}{4}$ of the members agree to do so. However, in this case, there is no evidence that the said number of members agreed that the 14 days notice be done away with (Rule 2. (3))

Rule 2 (5) provides that the Chairman shall preside at every meeting of the Board at which he is present but in his absence the Vice Chairman shall preside and conduct the business of the meeting. As per the minutes of 27/6/06 once the Chairman left the meeting because of the court order stopping the meeting, the Vice Chairman stepped in and took over the Chairmanship purportedly in accordance with the provisions of the Sugar Act. The Provisions of the law was not cited. On 27/6/06, the Chairman was not absent. He was present at the meeting and only left upon acknowledgement of the court order. The Vice Chairman cannot disobey a court order and purport to have been acting in accordance with the Sugar Act. The Vice Chairman had no authority to chair the said meeting and what he did was an illegality.

There is no doubt that when the meeting of 27/6/06 commenced, a court order in CMC 368/06 emanating from Kakamega Chief Magistrate Court was served. MIN KSB/59/06 of 27/6/06 acknowledges service of the order. The court order barred Andrew Oloo Otieno from acting as the Chief Executive Officer of the Board and holding of the Board meeting of 27/6/06 and the application in Kakamega was slated for hearing on 10/7/06. That order was alive and subsisting. It matters not whether the order was correct, wrong or null and void. It was a valid order of a competent court and had to be obeyed until it was set aside or discharged. In ***SHAH & ANUR LENTO AGENCIES V***

NATIONAL CREDIT BANK LTD (2005) IKLR, the court relied on the decision in ***HADKINSON V HADKINSON (1952) 2ALL ER 562*** where the court said **“It is the plain and unqualified obligation of every person against, in respect of whom, an order is made against by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”**

The above decision represents the law in Kenya.

The Board proceeded with the meeting in flagrant disregard of the courts order. The courts should always protect their authority and dignity. A penal notice was on the face of the order and the court takes a very serious view on the actions of the Board on that day.

It is Mr. Menge’s submissions that the meeting having been held over 4 years ago, the resolutions have already been implemented and the court would be acting in vain if it granted the said prayers to quash the resolutions of the meeting of 27/6/06. The question is what resolutions were made at that meeting? Though it is not indicated that it is a resolution, at Min. 61/06, the members unanimously passed a vote of no confidence in the Chairman, Mr. Joseph Mbai and declared the seat vacant, Mr. Saulo Wanambisi Busolo was unanimously elected by the Board as the new Chairman. At Min. KSB 62/2006, It was resolved that the earlier decision at Min/KSB/61/2006 be revoked and the contract of Mr. Otieno be renewed. These were the resolutions I have discerned from the minutes. The question is whether the orders of Judicial Review can issue. The decision sought to be quashed took place in 2006. It is now over three years since and it is trite law the Judicial Review remedies are discretionary in nature and sometimes, even though deserved, the court may decline to grant them. In his submissions, Mr. Wati urged that the prayer for

prohibition has been overtaken by events. The Notice of Motion dated 12/7/06 is before me but there is no prayer for prohibition. I however note that in the statutory statement at prayer (a), the applicant had sought an order of prohibition against the Ministry for Agriculture barring it from appointing and gazetting Saulo Wanambisi Busolo as Chairman of the Kenya Sugar Board. However, prohibition is not one of the prayers in the Notice of Motion. The Notice of Motion only contains two prayers of certiorari to quash the proceedings and resolutions of the 70th Special Board Meeting of the KSB held on 27/6/06 and quashing the renewal of the contract of Andrew Oloo Otieno. The reliefs sought in a Judicial Review application should be both in the statement and Notice of Motion. (see Order 53 Rule 4 (1) Civil Procedure Rules). That prayer does not exist and could not be granted in any event.

One of the resolutions in the meeting of 27/6/06 was the renewal of Otieno's contract. It is not clear how long this contract was to run but the letter of 22/5/06 (EXBI 5) does indicate that the contract was for 3 years. If that be the case, the three years contract must have lapsed. It is not known whether Otieno's contract has been renewed again based on the same resolution since the three years lapsed in June 2009. There should have been evidence to show that the contract still subsists based on the resolution of 27/6/06. In absence of that evidence the court cannot issue orders in vain and prayer (b) of the Notice of motion would not issue.

Prayer (a) is for the quashing of the proceedings and resolutions of the meeting of 27/6/06 generally. The other resolution made was that the Chairman was voted out of office for lack of confidence. It is not clear whether another Chairman was taken over since the one voted in that day. There should have been further evidence adduced to clarify whether the prayers would be of any relevance. In the circumstances, this court cannot

grant orders in vain and though they are deserved as I have considered earlier in this judgment, the order of certiorari cannot issue because it would not serve any purpose. It is due to the delay in the hearing of this matter due to the intervention by several-applications that this matter was delayed.

For the above reasons this court declines to grant any of the prayers sought in the Notice of Motion. I however order that each party bears their own costs.

Dated and delivered at Nairobi this 5th day of March 2010.

R.P.V. WENDOH
JUDGE

Present:

Mr. Wati for Applicant

Muturi - Court Clerk