



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW

MISC. APPLICATION NO. 11 OF 2017

**IN THE MATTER OF AN APPLICATION BY THE GREEN BELT MOVEMENT,
PANAFRICAN CLIMATE JUSTICE ALLIANCE AND TRANSPARENC INTERNATIONAL
KENYA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW AND ORDERS OF
CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF AN APPLICATION UNDER ARTICLES 1,2,3,10,27,56,93,94 AND 95 OF
THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF SECTION 7 OF CLIMATE CHANGE AT, NO, 11 OF 2016 ACT

AND

IN THE MATTER OF THE PUBLIC APPOINTMENTS (PARLIAMENTARY APPROVAL ACT

AND

NATIONAL ASSEMBLY STANDING ORDER NO. 45(4)

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NATIONAL ASSEMBLY.....1ST RESPONDENT

CABINET SECRETARY MINISTRY OF

ENVIRONMENT, NATURAL RESOURCES.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JOHN KIOLI.....1ST INTERESTED PARTY

CHARLES MWANGI.....2ND INTERESTED PARTY

CYNTHIA WECHABE.....3RD INTERESTED PARTY

EXPARTE

THE GREEN BELT MOVEMENT.....1ST EXPARTE APPLICANT

PANAFRICAN CLIMATE JUSTICE ALLIANCE.....2ND EXPARTE APPLICANT

TRANSPARENCY INTERNATIONAL KENYA.....3RD EXPARTE APPLICANT

RULING

1. This ruling determines the question of whether or not to grant stay in terms of prayer No. 6(a), (b) and (c) of the chamber summons dated 16th January 2017 which stipulates:

6: That the grant of leave do operate as a stay against:

a) The decision of the 2nd respondent not to forward the name of Charles Mwangi to the 1st respondent for consideration of approval as nominee of the Civil Society to the National Climate Change Council;

b) The decision of the 1st respondent of the 20th December 2016 rejecting the name of Ms Cynthia Wechabe as a nominee of the National Climate Change Council;

c) The appointment of Mr John Kioli, the 1st interested party herein as a member of the National Climate Change Council representing the Civil Society.

2. On 18th January 2017 this court granted to the exparte applicant leave to institute Judicial Review proceedings for orders of :

i. Mandamus to compel the 2nd respondent to forward to the 1st respondent the name of Charles Mwangi, the 2nd interested party herein, for consideration and approval as nominee of the Civil Society to the National Climate Change;

ii. Certiorari to move into this court and quash the decision of the 1st respondent of 20th December 2016 rejecting the name of Ms Cynthia Wechabe as a nominee of the marginalized community to the member of the National Climate Change Council;

iii. Mandamus to compel the 1st respondent to consider for approval the names of Mr Charles Mwangi and Ms Cynthia Wechabe as nominees of the Civil Society and marginalized community respectively to the National Climate Change Council.

iv. Prohibition directed at the 1st respondent from forwarding the name of Mr John Kioli the 1st interested party herein to H.E. the President for appointment as a member of the National Climate Change representing Civil society.

3. The main motion was dutifully filed on 20th January 2017.

4. The application was opposed by the 1st interested party who filed grounds of opposition on 9th February 2017. The 1st respondent National Assembly also filed grounds of opposition on 30th January 2017.
5. According to the ex parte applicant as demonstrated by its submission both written as filed on 30th January 2017 and orally highlighted by its counsel Mr Appollo Mboya on 30th January 2017, this court has jurisdiction and inherent power to grant stay, based on the prevailing circumstances, pending inter partes hearing. Reliance was placed on **Republic vs Kenya Revenue Authority & Another Ex parte Ramageco, JR 58/2013**.
6. Further, that Order 53 Rule 1 (4) of the Civil Procedure Rules permits this court to order at the time of granting leave to institute Judicial Review proceedings, to order that such leave shall operate as stay, in cases of an application for prohibition and certiorari, not in cases of mandamus, as was held in **ReJustus Nyagaya & Social Democratic Party NRB HC MISC A 1122/2008** where Nyamu J held that at the leave stage, it cannot be ordered that leave to apply for mandamus order do operate as stay because logically there can be nothing to stay in respect of the leave for mandamus unlike orders of certiorari and prohibition where such leave can, if ordered by a Judge operate as stay.
7. Counsel for the applicant also relied on **HCMISAPP 155/ 2006 Taib A. Taib Minister for Local Government & 3 others** where the learned Judge Maraga (Now Chief Justice and President of the Supreme Court) set out that the stay orders are limited in scope and purpose and concluded that a stay is only appropriate to restrain a public body from acting. Further, that in this case, the actions sought to be stayed are:
- a. Failure/neglect by the 2nd respondent to forward to the National Assembly(1st respondent) herein, the name of Charles Mwangi(the 2nd interested party) the nominee of the civil society to the National Climate Change Council(NCC);*
 - b. The 1st respondent on 20/12/2016 rejected the nomination of Ms Cynthia Wechabe the 3rd interested party herein as members of NCC forwarded by the civil society through a consultative process criteria to represent the marginalized community and instead replaced her with Mr John Kioli nominated by Kenya climate change working group which is not the most representative registered National Umbrella Association of Civil Societies working on climate change as required by Section 7(2) (g) of the Climate Change Act, No. 11 of 2016;*
 - c. The 1st respondent has approved the names of the nominees to the membership of the National Climate Change Council and H.E. the President may appoint the members of the National Climate Change Council anytime.*
8. That the appointments had not been made. According to the applicant, the court can stay the appointment of the person whose names shall be submitted. It was submitted that this court retains inherent jurisdiction to ensure observance of due process of law to prevent abuse of its process.
9. It was further submitted that Section 7(2) (g),(h) of the Climate Change Act, 2016 is clear on who should nominate a representative and that the Act does not provide for the procedure for nomination of members hence the relevant organization named therein sat and nominated persons, yet the National Assembly has approved all male nominees and rejected female nominees.
10. Further, that Section 7(b) of the Climate Change Act 2016 provides that the President in appointing members he shall ensure compliance with the 2/3 gender principle. Reliance was placed on the matter of the **Estate of George Mboroki Meru HCC Miscellaneous 357/2004** and **Ryann Investments Ltd & Another V USA [1970] EA 675** on the inherent powers of the court to ensure observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them.

11. It was submitted that the court should grant the orders sought to ensure that the ex parte applicant's notice of motion is not rendered nugatory by acts of the respondent during the pendency of the application.

12. In opposition to the prayer for stay, the 1st respondent filed grounds of opposition on 30th January 2017 and submitted orally on the said grounds through its counsel Ms Thanji who contended that Article 165 3(d) (2) of the Constitution is only applicable if some act has been done. That in this case, nothing has been done yet and that as we do not know what Parliament will do, the court cannot stop Parliament from carrying out its mandate as that would set a dangerous precedent.

13. Ms Thanji further submitted that this court can only review or nullify actions of Parliament. That there is separation of powers. Reliance was placed on the **Mumo Matemo case in Republic Vs National Assembly & Another Ex parte Coalition for Reform and Democracy (CORD) [2016] e KLR** and **CA 157/2009 John Harun Mwau V Dr Andrew Muller, Central Bank of Kenya & 2 Others** wherein the court held that the law does not allow judicial interference of Parliamentary proceedings except where Parliamentary legislation is contrary to the Constitution and Rule of Law and that such intervention should be exercised with restraint, and only in appropriate instances, bearing in mind the specific circumstances of each case.

14. It was submitted by Miss Thanji that under the Parliamentary approvals (Public Appointments Act) Section 7 thereof is clear that Parliament has to look at the process of nomination. That in this case, Parliament has already, requested for submission of two names of the female gender hence this application is premature. Counsel urged the court exercise judicial restraint and allow Parliament to carry out its constitutional mandate then the process can be challenged.

15. The 1st interested party also opposed the prayer for stay through his grounds of opposition filed on 9th February 2017 and written submissions together with arguments as submitted by his counsel Mr Omwenga on behalf of Professor Musili Wambua.

16. It was submitted that Senate had not received names of the nominees by the National Assembly and that the Senate can reject those names hence there is no imminent danger of being appointed by the President, and therefore the order of stay would not be efficacious at this stage. Reliance was placed on **Taib A. Taib vs Minister for Local Government & Others Mombasa HC Miscellaneous Application 158/2006** where Maraga J (as he then was) set out the scope of stay in Judicial Review matters and held that the scope and purpose of stay is limited and the court must exercise caution.

17. It was submitted that only the 1st respondent has made a decision hence stay can only be limited to the actions of the 1st respondent National Assembly, yet the prayer is touching on the presidency thereby making its scope unlimited which the court should not allow.

18. Further, Ms Thanji contended that the applicant has not sought to quash the nomination of John Kioli to the National Climate Change Council but sought for prohibition of the National Assembly from submitting his name for appointments by the President. That if stay is granted, Senate will be prohibited from deliberating on his name hence stay will influence senate deliberations.

19. The National Gender and Equality Commission (NGEC) was enjoined as a friend of the court vide an oral application by Mr Mbithi, by consent of all the parties to these proceedings.

20. Mr Mbithi on his part submitted on behalf of the National Gender and Equality Commission that Parliament (sic) approved 2 names which might proceed to be approved by senate and that the applicant is questioning how nominations and rejections were done. That under section 7 of the Climate Change Act, 2016, members of the council are 9 and that only the Cabinet Secretary for Environment is female hence the National Climate Change Council which is a public body will be unconstitutionally constituted.

21. That the court will not be interfering with functions of Parliament if it intervenes since Parliament has already made a decision hence it is not premature to interrogate that decision.
22. In a rejoinder, Mr Mboya submitted on behalf of the applicants that the Hansard Report of the National Assembly (NA) shows that there are approvals and that the Cabinet Secretary has forwarded names whose nomination process was flawed hence the challenge.
23. That the flawed process is still ongoing hence the decision in the Taib **A. Taib** case is relevant as it states that the purpose of stay is to prevent the decision maker from continuing the process. Counsel urged the court to be mindful not render the application nugatory.
24. At this point the court sought clarification from all the parties counsels as to whether Senate was bound by the decision of the National Assembly; and or whether the President is by law bound to appoint the persons whose names are submitted to him by Parliament.
25. Mr Apollo Mboya submitted that the President cannot decide who to appoint and that there is silence on whether the President can reject the nominees. However, it was submitted that the court can intervene where there is threat of violation of the Constitution on representation of the marginalized and the gender question.
26. Further, that the orders sought are equitable remedies and so the applicants had to come to court expeditiously and not wait until the violation of the law before coming to court because equity aids the vigilant not the indolent.
27. In a rejoinder, Miss Thanji submitted that what this court is being told is to jump the gun yet the National Assembly has already warned itself on the process and on the gender issue. However, that as senate is not a party to these proceedings, the court can only nullify the whole process and not bar the process at this stage until Senate has deliberated on it.
28. Mr Omwenga submitted that the applicant is at liberty to send a memorandum to the Senate to challenge the nomination stating their reservations hence the exparte applicants have a recourse. Further, that the President can write to Parliament rejecting appointment hence it is undesirable to arrest the nomination process at this stage.
29. Mr Mbithi for the National Gender and Equality Commission had nothing to add to his earlier submissions.

Determination

30. The only issue for determination is whether or not stay sought is merited. The grant of leave to operate as stay of enforcement of an impugned decision is an exercise of judicial discretion which must be based on the circumstances of each case. Stay is not a matter of course. The party seeking for stay must demonstrate to the satisfaction of the court that unless stay is granted, the applicant shall, if successful in the main motion, be rendered a mere pious explorer in the judicial process.

31. In **Taib A. Taib V Minister for Local Government & Others (Mombasa HC Miscellaneous CA 158 of 2006**, Maraga J (as he then was) was clear that:

“ as an injunction is not available against the government and public officers, stay is a very important aspect of the Judicial Review jurisdiction in order that the applicant’s application is not rendered nugatory by acts of the respondent during the pendency of the application and that therefore where the order is efficacious, the court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited.

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 and it not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or Minister and the implementation of the decision of such a body if it has been taken.

It is however not appropriate to compel a public body to act. A stay order framed in such a way as to compel the respondents to reinstate the applicant before hearing the respondent cannot be granted.

32. In **Republic Vs Ashworth Hospital Authority [2003] WLR 127 at 138**, Lord Dyson LJ stated; inter alia.

“The purpose of a stay in a Judicial Review is clear. It is to suspend the “proceedings “that are under challenge pending the determination of the challenge. It preserves the status quo. This will and the Judicial Review process and make it more effective. It will ensure, so far as possible, that if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In Aron, Glidewell, LJ said that the phrase “stay of proceedings” must be given wide interpretation so as to enhance the effectiveness of the Judicial Review jurisdiction. A narrow interpretation, such as that which appealed to the Privy Council in vehicle supplies, would appear to deny jurisdiction even in case A. That would indeed be regrettable and, if correct, would expose a serious short coming in the armoury of powers available to the court when granting permission to apply for Judicial Review . This it is common ground that “proceedings” includes not only the process leading up to the making of the decision but the decision itself. The administrative court routinely grants a stay to prevent the implementation of a decision that has been made but not yet carried into effect, or fully carried into effect.”

33. From the above decisions, it is clear that stay may be granted in exceptional cases and only in cases where the stay orders are meant to prohibit or suspend implementation of the decision and not where the stay orders sought are couched in mandatory terms. This is fortified by Order 53 Rule (4) of the Civil Procedure Rules which provides that:

“ The grant of leave under this rule to apply for an order of prohibition of an order of certiorari shall, if the judge so directs, operate as stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

34. In **Re Justus Nyangaya & Social Democratic party Nairobi HCC Miscellaneous Application 1132/2002** Nyamu J (as he then was) held that at leave stage, it cannot be ordered that leave to apply for mandamus order do operate as stay because logically there can be nothing to stay in respect of the order of mandamus unlike in certiorari and prohibition where such leave can if the judge orders, operate as stay.

35. Examining the prayers for stay, prayer 6(a) seeks for stay against the decision of the 2nd respondent **not to forward** the name of Charles Mwangi to the 1st respondent for consideration of approved as nominee of the Civil Society to the National Climate Change Council.

36. No doubt, to stay a decision **not to forward** is to seek to compel the decision maker to forward which is a mandatory order and which is expressly excluded from Order 53 Rule (4) of the Civil Procedure Rules hence this court will not belabour much, other than to find that prayer 6(a) of the chamber summons is not available to the applicants. It is declined and dismissed.

37. In the same vein, prayer 6(b) of the chamber summons seeks for stay of the decision of the 2nd respondent **rejecting** the name of Ms Cynthia Wechabe as a nominee to the National Climate Change Council which is related to the main prayer (4) for mandamus to **compel the 1st respondent to consider for approval** the names of Charles Mwangi and Ms Cynthia Wechabe as nominees of the

Civil Society and marginalized community respectively to the National Climate Change Council.

38. To stay the decision **rejecting** the name of Cynthia Wechabe as a nominee is to order by way of Mandamus compelling her **inclusion** in the names of nominees. Again, that is the power that is not available to this court at this stage, as stipulated in Order 53 Rule 4 of the Civil Procedure Rules that stay can only be ordered in certiorari and prohibition. The applicant's counsel concedes in his submissions that this court's power to grant stay is limited and such limitation is now clear.

39. The only prayer for stay which is couched in prohibitory terms is prayer 6(c) which seeks for stay of the appointment of Mr John Kioli, the 1st interested party herein as a member of National Climate Change Council representing the Civil Society.

40. This prayer is related to the main prayer for prohibition directed at the 1st respondent from forwarding the name of Mr John Kioli to the President for appointment as a member of National Climate Change Council representing Civil Society.

41. The reason why there is a challenge to Mr John Kioli's appointment is that he was nominated by Kenya Climate Change Working Group which is not the most representative registered national umbrella association of Civil Societies working in climate change as required by Section 7(2) (g) of the climate change Act No. 11 of 2016.

42. It was contended that the 1st respondent had approved names of nominees to the membership of the National Climate Change Council and that his Excellency the President may appoint the members of the National Climate Change Council at any time.

43. Parties are bound by their pleadings. In this case, the applicant has pleaded that the 1st respondent, the National Assembly has approved the nominees and are about to present their names to H.E. The President for appointment anytime.

44. However, during the hearing of the application, it was apparently clear that although the National Assembly which is one of the Houses of Parliament established under Article 93 of the Constitution has already approved and or rejected some nominees and replaced them, the National Assembly must submit the names of the approved nominees to the Senate which is another House of Parliament established under Article 93 of the Constitution, and it is only after the Senate approves the nominees that the names thereof are forwarded to H.E. the President by the Speakers of the two Houses jointly for appointment. There is no rule of law that the Senate is bound by the decision of the National Assembly. It can or may adopt or reject the nominees after deliberations, and give reasons for such decision.

45. This court retains residual powers to reverse a decision taken by the two Houses and even that of the President if the decision is made in violation of the law or the Constitution.

46. Parties advocates submitted at length on the jurisdiction of this court to interfere with Parliament which jurisdiction is said would violate the principle of separation of powers. There are a plethora of decisions on the issue as to whether or not this court can interfere with parliamentary processes. However, at this stage, this court will be venturing into the merits of the main motion if it took that direction. The court must confine itself to established principles of stay in Judicial Review proceedings.

47. In my humble view, it is upon the applicant to demonstrate that unless the order of stay is granted, the subject matter shall be destroyed or that the orders of court which are sought in the main motion shall be rendered nugatory, or that the exercise of the litigant of his constitutional right will be impeded or that even if the applicant succeeds, there would be no return to the status quo.

48. In the present case, this court does not foresee a situation where the subject matter of the proceedings will be destroyed or foisted upon the court a situation of complete helplessness or render

nugatory any judgment or order. In other words, the court does not see any compelling reasons for it to grant stay in terms of the nomination of Mr Kioli.

49. Furthermore, as the process of nominations of members to the National Climate Change Council is along winded process, the Senate which is not a party to these proceedings will have an opportunity to determine whether the nominations approved by the National Assembly complied with the gender Rule, which is also a matter for consideration at the substantive hearing of the main motion.

50. Furthermore, prayer No. 6 (c) of the chamber summons on stay presupposes that the 1st interested party has already been cleared by Parliament and that what is remaining is his appointment by H.E. the President which is not the case here. The evidence available shows that the 1st interested party was cleared by the National Assembly only and is yet to be discussed and or cleared by the Senate.

51. On the other hand, the Senate is not a party to these proceedings and no orders have been sought seeking to prohibit it from doing any act including presenting the name of John Kioli to H.E. the President for appointment as a member of National Climate Change Council.

52. It is on those accounts that I find that it would be presumptive for this court to assume that the senate will not follow the law in its deliberations when there is nothing to show that it is bound by the decision of the National Assembly.

53. Senate is a voice of reason on its own and therefore it is not appropriate for this court to imagine that it will not comply with the law regarding appointments to the National Climate Change Council.

54. Further, the President is bound by the law. Section 7 of the Climate Change Act mandates him in appointing members to the NCCC to ensure that the 2/3 gender principle is adhered to.

55. The applicant and others are at liberty to submit a memorandum or memoranda reminding or advising the Senate and or His Excellency the President, of any irregularity in the manner in which nominees to the National Climate Change Council as cleared by the National Assembly were nominated.

56. There is no indication that Senate will not adhere to the law, and if it does, then nothing prevents the courts from nullifying the whole process, including appointments that violate the law, so as to uphold the rule of law and Constitutionalism.

57. It is for the above reasons that I find that the exparte applicant has not demonstrated before this court that he deserves the prayer that leave granted do operate as stay in terms of prayer No. 6 (c) of the chamber summons.

58. In the end, I decline to grant all the prayers for stay and dismiss them. I order that each party bears its own costs of the prayer for stay.

Dated, signed and delivered at Nairobi this 13th day of February 2017.

R.E. ABURILI

JUDGE

In the presence of:

Mr Apollo Mboya for the exparte applicants

Miss Thanji for the Respondent

Mr Omwenga for the first interested Party

CA: George