REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC APPLICATION NO. 113 OF 2013

REPUBLIC...APPLICANT

VERSUS

JUDGES AND MAGISTRATES

VETTING BOARD………..............................…………RESPONDENT

Ex parte HON. LADY JOYCE KHAMINWA.................APPLICANT

RULING

INTRODUCTION

1. By a Chamber Summons dated 4th April 2013 filed in Court the same day, the applicant herein, **The Hon. Lady Justice Joyce Khaminwa** seeks the following orders:

1 .That this Applicant be granted leave to apply for an Order of Certiorari to bring into this court and to quash the decision of respondent issued on the 1st March, 2013.

2 .That the applicant be reinstated to her previous position as the Judge of the High Court of Kenya.

3 .That the leave so granted to operate as a stay of the execution of the decision by the Respondent herein.

4 . Costs of this application be provided for.

2. On 4th April 2013, a single Judge of this Court heard the applicant and granted prayer 1 of the said Chamber Summons. Accordingly that prayer is not the subject of this ruling.

APPLICANT’S CASE

3. The application is supported by the Statutory Statement filed together with the Chamber Summons and

the applicant's verifying affidavit sworn on 4th April 2013.

4. According to the said affidavit, the applicant's experience in the legal profession saw her elevated to the position of Commissioner of Assize and subsequently, a judge of the High Court of Kenya in the year 2003 and she has diligently and impartially served in the Judiciary as a Judge for over 10 years. After the promulgation of the Constitution of Kenya on 27th August 2010, it became a requirement that all judges and magistrates serving at the effective date undergo a vetting process to determine their suitability to continue serving as such. According to the applicant, the said provision of the Constitution is explicitly clear that the Vetting Board is to determine the suitability of judges and magistrates in accordance with the values and principles set out in Articles 10 and 159 of the Constitution.

5. It is the applicant's position that sometime back after the hearing and deliberation of her case, the Board came up with a decision which found her unsuitable to continue serving as a Judge of the High Court. However on perusing the said ruling of the Board the applicant discovered serious legal defects which prompted her to request for a review of the decision. However, after considering the applicant's application for review, the Board on the 1st day of March, 2013, came up with a decision in which there was no substantial change in the legal reasoning of the Board.

6. It is the applicant's view that the entire decision violates the law, the Constitution and the ***Vetting of Judges and Magistrates Act, 2011*** (hereinafter referred to as "the Act"). According to the applicant's understanding, a Judge or Magistrate is unsuitable to continue serving if his/her previous conduct has in any way violated principles set out in Articles 10 and 159 of the Constitution of Kenya, 2010. However, the applicant contends that having read the entire decision, in no particular instance has the Board referred to her previous conduct being in conflict with the said principles as enshrined in Articles 10 and 159 of the Constitution which principles constitute the guiding criteria to be used by the Board in carrying out their mandate. It is therefore her view that the Board made their determination outside the said criteria.

7. The basis of the Board's decision, according to the applicant, was on the applicant's past medical condition which at times made it impossible for her to attend court to discharge her duties. The applicant, however, avers that at no point did she wish upon herself such medical conditions and misfortunes, but has always done her best to discharge her duties with due diligence. She further deposes that she has never absented herself from duty at any time except for times when her medical condition made it impossible and that upon successful treatment she resumed her duties and worked effectively. To the applicant, her previous conduct is not and has never been in conflict with Articles 10 and 159 of the Constitution hence no basis for finding her unsuitable to continue serving to the bench.

8. It is therefore the applicant's view that the decision to render her unsuitable lacks any serious basis in law, if at all, is entirely discriminative of her past medical condition and age thus violating the very principles and values of the Constitution. Accordingly, the applicant is convinced beyond all reasonable doubt that the Board's decision is vexatious and was premised not on her previous conduct but that of her lawyers during the vetting process as noted in the Board's determinations.

9. On 4th April 2013, as is the procedure in judicial review applications, the applicant's advocate Senior Counsel **Dr. Khaminwa**, appeared before a Single Judge of this Court ex parte and after being heard the Court directed pursuant to the provisions of Article 165(3) and (4) of the Constitution that the matter be placed before the Hon. Chief Justice to consider empanelling a bench composed of more than one Judge to hear the matter. The Court while granting leave to apply for judicial review directed, as the Court is properly entitled under the proviso to Order 53 rule 1(4) of the Civil Procedure Rules, that the limb of the application seeking an order that the grant of leave do operate as stay of execution of the decision by the Respondent herein, be dealt with by the bench as reconstituted. After considering the matter the Hon. Chief Justice on 17th April 2013 directed that the matter be heard by a bench of three judges as presently constituted.

<u>RESPONDENT'S CASE</u>

10. In opposition to the application the Respondent filed the following grounds of opposition:

1. That there is nothing to be stayed: the Judges and Magistrates' Vetting Board has made its findings; it is by the operation of the law in Section 23 of the Sixth Schedule to the Constitution of Kenya as read with Section 7 (3) and (4) and 21(2) of the vetting of Judges and Magistrates Act that the applicant ceased holding office.

2. That reinstatement to employment is not a prayer within the purview of Judicial Review and is purely a labour issue. The prayer for certiorari alone in the main Motion is inadequate to remedy the applicant's grievance hence the inclusion of this supplementary prayer; if certiorari unsupported by any order outside Judicial review is insufficient to remedy the grievance, the probability of the success of the Judicial review application is in doubt, hence no stay ought be granted.

3.That the criteria that was applied to the applicant is the same criteria that is used by the Judicial Service Commission to determine the suitability of fresh candidates applying for the position of a judge for the first time as per Section 13 of the 1st Schedule to the Judicial Service Act 2011. The applicant was subjected to the same criteria by the Board and failed the test, which meant that her continued service would not meet the standards required under the Constitution of Kenya 2010; reinstating her to her duties under the circumstances would be prejudicial to the express law and public interest.

4.That the court is not restricted to the law in considering stay but the factual circumstances surrounding the whole case; in this regard the vetting process is not a trial on particular issue (in this case, the medical condition of the applicant) but is an in depth inquiry for the purpose of establishing the suitability of a judge or a magistrate to continue in office based on a very wide spectrum of issues.

5.That the same facts which are attributed to the applicant regarding her medical condition, could independent of any medical opinion, afford sufficient ground for the board to rule that the petitioner was not fit to continue in office as long as consideration of those facts legally fell within the Board's mandate.

6.That the applicant's counsel appeared before the vetting of Judges and Magistrate's Board and applied that the applicant could not be kept at the interview room for the whole day owing to her medical condition. This is part of the testimony that the health conditions of the applicant were not just a concern to the Board but also to other persons, hence putting to question the suitability of the applicant to serve in the Judiciary.

7.That the Board did not have to rely on medical advice or documentary evidence to come to the conclusion that the applicant is unfit to hold office; the same observations and findings that would have medically supported the disqualification of the applicant are the same criteria that would have supported her disqualification under section 18 of the Vetting of Judges and Magistrates Act; hence stay should be denied.

8.Leave has not been sought for prohibition in accordance with Order 53 Rule 1(1). Prohibition cannot therefore be sought in the main application. Stay is predicated on the merits in the main Motion, if there is no merit in the main Motion, then there is no purpose served by granting stay.

9.That the matters subject of the current application are the subject of other Judicial review Applications and Petitions and an Appeal, Civil Appeal No 308 of 2012 law Society of Kenya Versus the Centre for Human rights and Democracy and 12 others and civil 123 of 2012 Dennis Mongare versus the Attorney General and 3 others, is pending on inter alia,

a. Whether jurisdiction of all courts in Kenya to entertain cases arising out of the removal or process of removal of a judicial officer by virtue of the Vetting of Judges and Magistrates Act is

ousted by the express provisions of section 23(20 of the sixth Schedule in the Constitution of Kenya 2010.

b. An 'Ouster clause' in a Constitution is to be construed in absolute terms being the express intention of the sovereign will of the Kenya populace.

c. There has been violation by the Vetting of Judges and Magistrates' Board of Article 10 and 159 of the Constitution of Kenya 2010 or of rules of natural justice or principles of international law or conventions in the decisions of the respondent's declaring the Applicant unfit to serve as a Judge.

10. That the provisions of section 22 of the Vetting of Judges and Magistrates Act do not ipso facto contravene the rules of natural justice and are not invalid, unlawful, illegal, null or void and they do not contravene any provision of the constitution.

11. That the provisions of Article 259 of the constitution demand that the Constitutional agenda of section 23 of the Sixth Schedule be given effect irrespective of status.

APPLICANT'S SUBMISSIONS

11. In his submissions, **Dr Khaminwa** clarified that the applicant was not seeking that she be permitted to continue sitting as a High Court Judge but the applicant was only seeking that the status quo be maintained and that she continue retaining her status as a Judge and that she ought not to be relieved of the office until the application is heard and determined. According to **Dr Khaminwa** the grounds of opposition filed by the respondents address the substantive application. He reiterated that whereas the Board dismissed all the complaints levelled against the applicants, the Board by mere observation of the applicant decided that the applicant was not fit to be a Judge of the High Court due to her ill-health notwithstanding the report of the applicant's doctor that the applicant was fit to resume her duties. In the applicant's view, the Board members constituted themselves into a medical board without medical evidence contradicting the applicant's doctor's medical report. According to the applicant the reasons relied upon by the Board were not the ones provided under Article 10 of the Constitution as read with section 23 of the Act and that the Board contravened the provisions of Article 50 of the Constitution with respect to affording parties a fair hearing. In the applicant's view the issues raised by the applicant raises critical issues that ought to be determined such as the discrimination of the applicant on the basis of health.

12. It is the applicant's position that unless the stay sought is granted, the applicant would be relieved of her position hence she would have been effectively denied of the opportunity to canvass fundamental issues touching on the Constitution, the judiciary and the tenure of a judge.

RESPONDENT'S SUBMISSIONS

13. In opposing the application, **Mr Njoroge** learned counsel for the respondent submitted that there is nothing to be stayed. In his view the process of removal of a judicial officer by vetting commenced on 27th October 2010 by the enactment of section 23 of the Sixth Schedule to the Constitution. In **Mr. Njoroge's** view, the decision of the Board is not subject to any review or quashing and under section 21(3) of the Act the judge ceased holding office when the process of the vetting is over. According to him, the Court could only stay the decision when the same is still under review and not when the process has come to an end. To grant the stay sought, counsel argued would amount to reinstatement yet the vacation of office takes place by operation of the law.

14. It is submitted that the remedy of reinstatement cannot be granted in judicial review proceedings hence the second prayer sought cannot be granted. It is further submitted that without seeking an order of prohibition which cannot in any case be granted, the order of certiorari is incompetent.

15. To grant the stay, **Mr Njoroge** submits would be discriminatory as it would amount to applying a different standard to serving judges from the standards applicable to judges who are being recruited.

16. The court, counsel submitted ought to look at the entire circumstances and once the Court finds that there was logic in the decision of the Board that would be sufficient. To him the decision was based on a broad spectrum of issues and not just the medical condition of the applicant. The Board, it is submitted was entitled to observe the applicant and make a decision and if there were evident signs before the Board the Board was entitled to make its own decision without relying on medical evidence.

17. It is submitted on behalf of the respondent that since the Court of Appeal is seized of appeals arising from decisions challenging the decisions of the Board, there ought to be no hurry in determining the present application since the orders sought herein may end up contradicting the orders of the Court of Appeal. Should the Court eventually find the application merited, it is submitted that the applicant can be compensated. However, the respondent stand to be prejudiced if the order sought is granted. Lastly, it is submitted that there is no mention in the affidavit of the action which is apprehended hence the stay cannot be granted.

REJOINDER

18. In his brief response **Dr Khaminwa** reiterated that the issues raised by the respondent go to the merits of the substantive application itself.

DETERMINATION

19. We have considered the material on record and the submissions of counsel.

20. In **Jared Benson Kangwana Vs. Attorney General Nairobi HCCC No. 446 of 1995** it was held that in an application for leave to apply for judicial review and stay of proceedings the Court has to be careful in what it states lest it touches on the merits of the main application for judicial review and that where the application raises important points deserving determination by way of judicial review it cannot be said to be frivolous. Therefore where the outcome of the judicial review might in a manner be contrary to the conclusion reached by the inferior tribunal, stay of proceedings should be granted as it might lead to an awkward situation.

21. Maraga, J (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 Of 2006** was of the view that:

"As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction… In judicial review applications 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 and 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….. 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."

22. The consideration whether or not to grant stay was summarised in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**, where the Court stated *inter alia* that in the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration.

23. In this case, it is however contended that under section 21 of the Act, once the Board makes a determination the decision takes effect hence there is nothing to be stayed. The said provision states as follows:

(1) The Board shall, upon determining the unsuitability of a judge or magistrate to continue serving in the Judiciary, within thirty days of the determination, inform the concerned judge or magistrate of the

determination, in writing, specifying the reasons for the determination.
(2) Once informed of the decision under subsection (1), the judge or magistrate shall, subject to section 22, be deemed to have been removed from service.
(3) The decision to remove a judge or magistrate from service shall be made public.

24. We must stress that at this stage we are neither required nor entitled to make any definitive or conclusive findings on the issues before us. However, in deciding whether or not to grant the stay sought we are entitled to make a *prima facie* finding on whether or not we are properly seized of the jurisdiction to entertain the dispute before us since that impliedly is the respondent's argument. It must be noted that section 21 of the Act is subject to section 22 of the Act which provides as follows:

(1) A judge or magistrate who has undergone the vetting process and is dissatisfied with the determination of the Board may request for a review by the same panel within seven days of being informed of the final determination under section 21(1).
(2) The Board shall not grant a request for review under this section unless the request is based—

(a) on the discovery of a new and important matter which was not within the knowledge of, or could not be produced by the judge or magistrate at the time the determination or finding sought to be reviewed was made, provided that such lack of knowledge on the part of the judge or magistrate was not due to lack of due diligence; or

(b) on some mistake or error apparent on the face of the record.
(3) The decision by the Board under this section shall be final.

25. Section 23(2) of the Sixth Schedule to the Constitution, on the other hand provides as follows:

(2) A removal, or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or review by, any court.

26. The phrase ***"shall be final"*** has been jurisprudentially analysed by the courts in the past decisions. Section 17(2) of the repealed ***Trade Disputes Act***, for example, provided that the orders of the Industrial Court were final and not subject to any review, variation, setting aside, appeal and/or otherwise.

27. Visram, J (as he then was) while dealing with the said provision in **Kenya Airways Limited vs. Kenya Airline Pilots Association Nairobi HCMA No. 254 of 2001 [2001] KLR 520,** held that indetermining whether the High Court has power to correct an error on the face of the record by way of certiorari notwithstanding the ouster clause, a distinction is to be drawn between an error of law which affects the jurisdiction and one which does not. The learned Judge further held that where an Act contains a finality clause that Act cannot prevent the High Court from acting where the inferior tribunal has acted without jurisdiction.

28. In **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** it was held:

"It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect. Many modern statutes contain provisions, which attempt to remove decisions of tribunals or Ministers from review by the courts by making these decisions 'final' or 'conclusive'. The remedy by *certiorari* is never taken away by statute except by the most clear and explicit words. The word "final" is not enough. That only means "without appeal" but does not mean without recourse to *certiorari.* It makes the decision final on the facts but not final on the law. Notwithstanding that the decision is by statute made "final" *certiorari* can still issue for excess of jurisdiction or for an error of law on the face of the records…… And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of

the Superior Court's to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise……. A statute setting up a tribunal may of course, in clear and precise words, debar any inquiry that may be necessary to decide whether the tribunal has acted within its authority or jurisdiction and such a provision would operate to debar contentions that the tribunal while acting within its jurisdiction has to come to wrong or erroneous conclusions. There would, however, even in such a case, be no difficulty in pursuing and adducing evidence in support of an allegation, for instance, that the members of the tribunal had never been appointed to act as such members or that those who had been appointed had by some irregular conduct disqualified themselves for membership of the tribunal. Further, it seems, there would be no difficulty in raising any matter that goes to the right or power of the tribunal to exercise the function of the power vested upon it. What an ouster clause does is to forbid any questioning of the correctness or the validity of a decision or determination, which it was within the area of jurisdiction of the tribunal to make. If the tribunal while acting within its jurisdiction makes an error, which it reveals on the face of its recorded determination, then the Court, in the exercise of its supervisory function, may correct the error unless there is some provision preventing a review by a Court of law. If a particular issue is left to the tribunal to decide, then even where it is shown that in deciding the issue left to it the tribunal has come to a wrong conclusion, that does not involve that the tribunal has gone outside its jurisdiction. It follows that if any errors of law are made in deciding matters, which are left to the tribunal for its decision such errors, will be errors within jurisdiction. If issues of law as well as facts are referred to a tribunal for its determination, then its determination cannot be asserted to be wrong if Parliament has enacted that the determination is not to be called up in question in any court of law. If, therefore a tribunal while within its area of its jurisdiction committed some error of law and if such error was made apparent in the determination itself (or as is often expressed, on the face of the record) then the superior Court could correct that error unless it was forbidden to do so and it would be so forbidden if the determination was 'not to be called in question in any court of law'. If so forbidden it could not then even hear the argument which suggested that error of law has been made. It could however, still consider whether the determination was within 'the area of the inferior court's jurisdiction'."

29. Ours is therefore not a lone voice shouting in the wilderness if we express a prima facie view, which we hereby do that we have jurisdiction to grant the orders sought herein where it is shown that the impugned decision is tainted with illegality, irrationality and procedural impropriety as defined in **Council of Civil Unions vs. Minister for Civil Service [1985] AC 374, [1984] 3 All ER 935** but not on the merit of the decision. In our view, it is arguable whether or not the Board's decision is under no circumstances subject to the supervisory jurisdiction of the High Court under Article 165(6) of the Constitution taking into account the fact that Article 165 of the Constitution is not one of the provisions expressly excepted under section 23(1) of the Sixth Schedule to the Constitution. What for example would be the recourse available to a judicial officer in a case where the Board decides contrary to the provisions of section 19(6) of the Act which enjoins the Board to apply the rules of natural justice to make a determination without affording the judicial officer concerned an opportunity of being heard or where the Board were to decide that to remove a Judge who was appointed after the promulgation of the new Constitution? Would the Court in such circumstances sit back and say that it has no jurisdiction whatsoever to inquire into a decision made by the Board? As was held by **Platt, JA** in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

"Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair."

30. We do not think that the Board's decision cannot be challenged under any circumstances.

31. Dr Khaminwa has submitted that the applicant is not seeking to be permitted to resume her judicial duties. We, on our part, are of the view that at this stage of the proceedings we do not have the power to make the orders in terms of prayer 2 of the Chamber Summons reinstating the applicant. However, as was held in **Taib A. Taib vs. The Minister for Local Government & Others** (supra) "**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".** In this case if the decision of the Board is implemented before the application is heard, we are unable to fathom under what circumstances the Court would be able to undo her removal even if the Court were to eventually find in her favour.

32. With respect to the matters pending in the Court of Appeal, we are aware that in Civil Application No. 280 of 2012, the Court of Appeal ordered inter alia that the conservatory order given by the High Court restraining the degazettement of the judges specified in the said order be extended until the hearing and determination of the said appeals. The Court of Appeal in our view did appreciate the gravity of the issue before it and the consequences of not extending the conservatory orders. We are of the view that if the Court of Appeal was to determine the appeals pending before it there would be nothing to prevent the respondent from moving this Court for appropriate orders since the Court always retains an inherent jurisdiction to set aside orders of stay granted in judicial review proceedings if the circumstances deem so.

33. It was submitted on behalf of the respondent that even if the applicant is removed from her position as a Judge and she were to succeed in this application she would be compensated for the loss she would have be sustained. It is now trite that the position of a Judge of a Superior Court cannot be treated in the same manner as that of an ordinary employment. A Judge of a Superior Court's position has statutory underpinning hence it is not the kind of position where it can be said that the loss of the status can be compensated in monetary terms. See **Eric V J Makokha & 4 Others vs. Lawrence Sagini & 2 Others Civil Application No. Nai. 20 of 1994.**

34. It is therefore our view that this is a case in which the implementation of the determination of the Board that the applicant, **Hon. Justice Joyce Nuku Khaminw**a, is unsuitable to continue serving as a judge ought to be suspended pending the hearing and determination of these proceedings or until further orders of the Court.

ORDER

35. In the result, save for the applicant continuing to carry out her duties as a High Court Judge, we suspend the applicant's degazettement and direct that the applicant retains her status as a High Court Judge together with the benefits that appertain thereto pending the hearing and determination of these proceedings or until further orders.

36. The costs of this application will be in the cause.

Dated at Nairobi this day 7th of May 2013

W K KORIR	***G V ODUNGA***	***P NYAMWEYA***
JUDGE	***JUDGE***	***JUDGE***

Delivered in the presence of Mr Albert Khaminwa for Dr Khaminwa for the Applicant and Mr Njoroge for the Respondent: