



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Ong’ow v Agriculture and Food Authority & 18 others (Civil Application E604 of 2023) [2024] KECA 1233 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1233 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E604 OF 2023
F TUIYOTT, GWN MACHARIA & PM GACHOKA, JJA
SEPTEMBER 20, 2024**

BETWEEN

SAMWEL ONYANGO ONG’OW APPLICANT

AND

AGRICULTURE AND FOOD AUTHORITY 1ST RESPONDENT

**CABINET SECRETARY AGRICULTURE AND LIVESTOCK
DEVELOPMENT 2ND RESPONDENT**

JECHONIAH SAMUEL OYOO 3RD RESPONDENT

MESHACK SHATIMBA 4TH RESPONDENT

STEPHEN OLE NARUPA 5TH RESPONDENT

DAN OPOLO 6TH RESPONDENT

SIMON WESECHERE 7TH RESPONDENT

CYPRIAN MULISA 8TH RESPONDENT

LEAH CHEPKWONY 9TH RESPONDENT

PAUL OWUOR 10TH RESPONDENT

PAMELA MASITSA 11TH RESPONDENT

MICHAEL ARUM 12TH RESPONDENT

WYCLIFFE BIKETI 13TH RESPONDENT

DANIEL ONDENYI 14TH RESPONDENT

AGGREY WERE 15TH RESPONDENT

JAMES ODHIAMBO LWAI 16TH RESPONDENT



WILSON KILUSY 17TH RESPONDENT
JOSEAH LESSAN 18TH RESPONDENT
ANDREW BETT 19TH RESPONDENT

(Being an application for stay of execution pending the hearing and determination of the appeal from the Judgment and Decree of the High Court (Judicial Review Division) at Nairobi (J. Chigiti, J.) dated 28th November 2023 in JR App. No. E045 of 2023)

RULING

1. The appointment of Samwel Onyango Ong'ow (the applicant) made on 16th March 2023 by the Cabinet Secretary for Agriculture and Livestock Development as a Board Member of Agriculture and Food Authority (AFA) quickly ran into headwinds and remains troubled.
2. Very shortly after the publication of the appointment in the Kenya Gazette, the appointment was stayed on 30th March 2023 by the High Court in Judicial Review No. E045 of 2023 Republic -v- Ezra Okoth Oloidi & 3 Others. On 28th November 2023, the High Court (Chigiti, J.) quashed the appointment.
3. The applicant, Ezra and the Kenya National Federation of Sugarcane Farmers are aggrieved by the judicial review decision and through a Notice of Appeal lodged in the trial court on 8th December 2023, have evinced their intention to challenge it. Now before us is the applicant in a motion dated 13th December 2023 and brought under the overworked provisions of Rule 5(2)(b) of the [Court of Appeal Rules, 2022](#), seeking a stay of execution of that judgment pending the hearing and determination of the intended appeal.
4. We have reflected on the motion, the response thereto and the written arguments made for and against the motion, and the oral highlights of those arguments made in the plenary hearing by Ms. Awuor for the applicant and Ms. Kwang'a for the 3rd to 19th respondents and have reached a decision that the motion is not for granting.
5. While there was a concession by Ms. Kwang'a that the appeal presents an opportunity for an authoritative pronouncement of the law on what constitutes a valid nomination under section 5(1) (i) of the [Agriculture and Food Security Act](#) and is no doubt an arguable appeal, there are difficulties granting a stay whose effect will be that the applicant now assumes office as a board member of AFA pending the hearing and disposal of the appeal.
6. The application is premised on three arguments: that the applicant is currently serving under a fixed term contract of 5 years and if the judgment is not stayed then the term of the contract shall lapse; the 1st and 2nd respondents are likely to commence another recruitment process and hence render the entire appeal nugatory; and it is in public interest that the stay be granted to ensure there is representation of the entire sugar industry in AFA Board.
7. The applicant laments the possibility of either his term expiring or him being replaced before the appeal is heard and determined and is therefore apprehensive of a personal loss. That said, the office of member of Board of AFA is a public office and for that reason the private interest of the applicant must be weighed against the public good that the appointment of a person to that office passes statutory muster. It may well be against public interest that a person whose appointment has been declared to be invalid



by a court of law should hold a public office as he pursues an appeal to challenge the correctness of the court decision. An argument in favour of private interest is even less compelling where, like here, the applicant never assumed office in the first place. We find that the scale tilts in favour of public interest because any personal loss suffered can be compensated by way of damages while the converse may not be possible. Observations made by the court, not too long ago, in *Attorney General -v- Matindi & 55 others* (Civil Application E314, E300 & E309 of 2023 & E296 of 2022 (Consolidated)) [2023] KECA 1475 (KLR) (8 December 2023) (Ruling) rings true in the circumstances here;

" If, for example, after hearing the appeals this Court finds that the offices were created constitutionally, there will be constitutional certainty and the applicants will assume office and start rendering service. If, on the other hand, the Court finds that the offices were created in violation of *Constitution*, we cannot fathom how the public can be compensated or how it can be comforting to tell the people of Kenya that, after all, service has been rendered to you, never mind it is service in violation of *Constitution*. Where purported service is rendered in violation of *Constitution*, it does not require rocket science to fathom that it is not legitimate service beneficial to the public. Service rendered in violation of *Constitution* is no service at all in the eyes of the law."

8. The other contention by the applicant that there would be a public interest benefit if stay were to be granted because the entire sugar industry is now unrepresented in the AFA Board may have been attractive if it was not for the dearth of evidence that it is indeed true that the interests of the sugar industry is suffering because of the absence of a representative from the sugar subsector. While it is true that statute requires that at least eight of the persons to be appointed on that Board are farmers representing farming organizations in the major crops subsectors in Kenya, we do not perceive that, in the absence of concrete evidence, the agenda of the eight appointees would be parochial and would be to only agitate the interests of the subsectors they represent. We are saying that it is not obvious to us, without some evidence, that the interest of the sugar subsector has been or is in danger of being neglected in AFA merely because the applicant is currently not a board member.
9. In the end, we do not find merit in the notice of motion dated 13th December 2023 which is hereby dismissed with costs

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

F. TUIYOTT

.....

JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCIArb.

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

