Attorney General v Katiba Institute & 2 others (Civil Application E184 of 2021) [2021] KECA 38 (KLR) (23 September 2021) (Ruling)

Neutral citation: [2021] KECA 38 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E184 OF 2021

MSA MAKHANDIA, P NYAMWEYA & M NGUGI, JJA

SEPTEMBER 23, 2021

BETWEEN

ATTORNEY GENERAL ..... APPLICANT

AND

KATIBA INSTITUTE ..... 1ST RESPONDENT

AFRICA CENTRE FOR OPEN GOVERNANCE ..... 2ND RESPONDENT

PUBLIC SERVICE COMMISSION & 129 OTHERS ..... 3RD RESPONDENT

(An application for stay of execution of the orders of the High Court at Nairobi (Lesiit, Chacha and Njuguna, JJ) dated 27th May 2021 in Petition No. 236 of 2018)

RULING

1. The dispute in the Constitutional & Human Rights Division of the High Court was commenced by way of a petition filed by the 1st and 2nd respondents against the applicant. The petition challenged the selection and appointments of the 4th to 129th respondents by the president and the members of his cabinet, to positions of either chairpersons or members of boards of various state corporations and parastatals. To the 1st and 2nd respondents, this mandate should have been exercised by the 3rd respondent in accordance with Articles 10(2) (c), 27(3) and 232(2) (g)-(i) of the *Constitution of kenya*, the *Public Officer Ethics Act* , and the *Public Service (Values & Principles) Act*. That the parastatals and state corporations fall within the purview of public offices and therefore the appointments ought to have been undertaken by the Public Service Commission and that the aforesaid appointments therefore were in contravention of Section 22 of the Public Officer Ethics Act and Section 10 of the Public Service (Values and Principles) Act. In the ultimate the 1st respondent sought the following reliefs:

    a) A declaration that appointments to state corporations and agencies are appointments in the public service and must adhere to articles 10(2)(C), 27(3) and 232(2)(g-i) of the Constitution.

b) A declaration that Article 234(2)(a)(ii) of the Constitution confers the Public Service Commission and no other person or body with the power to make appointments for chairpersons and board members of state corporation and agencies save for those expressly excluded by Article 234(3) and (4) of the Constitution.

c) A declaration that the appointments to various state corporations and agencies by the president and the Cabinet Secretaries of 5th and 7th June 2018 which are notified in Kenya Gazette notice numbers 5569 to 5621 and 5622 to 5623 are unconstitutional for breach of articles 2(2),10(2) (C), 232(2)(g-i) and 234(2)(a)(ii) of the Constitution and are hence invalid.

d) A declaration that all those sections enumerated under paragraph 16 of the petition are unconstitutional because they violate articles 2(2),10(2)(C), 232(2) (g-i) and 234(2)(a)(ii) of the Constitution.

e) A declaration that the Public Service Commission is in dereliction of its constitutional duty for failing to undertake the appointments to various positions of chairperson and board members of state corporations and agencies and for acquiescing to the action of the president and cabinet secretaries making the appointments enumerated under paragraph 12 of the petition and hence it has violated articles 2(1),3(1), 10, 234(2)(a)(ii) & (d) and 249 of the Constitution.

f) An order that the provisions enumerated under paragraph 16 of the Petition are unconstitutional and void.

2. The petition was opposed by the applicant, 3rd, 35th to 39th,78th to 81st, 85th to 86th, 122nd and 129th respondents respectively either through replying affidavits or grounds of opposition. They all advanced the arguments that the appointments were made in conformity with the Constitution and the applicable statutes; the president and the Cabinet Secretaries had the power to make the appointments pursuant to the doctrine of presidential or executive prerogative; the petition was thus misplaced and lacked merit as it was based on wrong interpretation of the Constitution and the law. Finally, that the 1st and 2nd respondents had failed to establish the breach of law and the Constitution.

3. There were no responses from the other respondents.

4. The petition was canvassed by way of written submissions with limited oral highlighting. Having considered the petition, the responses and the submissions by the parties the trial court held that the appointments did not comply with the principles set out in Articles 10 and 232 of the Constitution. The trial Court further found that the appointments were unconstitutional, invalid and issued the declarations sought as above.

5. Aggrieved by the judgment and decree, the applicant filed a notice of appeal and subsequently this motion on notice pursuant to Rule 5(2) (b) of this court's rules. The applicant has asked us to grant stay of execution of the judgment and decree pending the hearing and determination of the intended appeal.

6. The grounds in support of the application are: that the judgment affected appointments as chairpersons and members of Boards or Trustees of the Kenya Leather Development Council; Kenya Water Towers Agency; the National Cancer Institute of Kenya; the Kenya Animal Genetic Resources Centre; the Kenya Plant Health Inspectorate Service; Kenya Civil Aviation Authority; the National Authority for the Campaign Against Alcohol and Drug Abuse, the Kenya Deposit Insurance Fund and the Kenya Trade Network Agency whose operations have been halted and the provisions pursuant to their appointments having been found unconstitutional cannot be used by the appointing authorities; these institutions play key roles in the provision of essential services to the citizens and thus the

members of the public would be most affected; the court failed to properly interpret Articles 10 and 232 of the Constitution; the contracts entered into by the parastatals and state corporations during the tenure by the officials whose appointments have been nullified could be challenged on grounds of illegality and that it had an arguable appeal which would be rendered nugatory absence of stay.

7. In support of the motion is an affidavit sworn by Kennedy Ogeto the Solicitor General. He reiterated and expounded on the grounds aforesaid and further deposed that the trial court failed to consider the provisions of section 7 of the 6th Schedule to the Constitution and that the trial court was bound to interpret the provisions complained of with necessary adaptations and modifications and not to declare them unconstitutional.

8. In opposing the application, the 1st and 2nd respondents filed a replying affidavit sworn by Christine Nkonge, the Executive Director. She deposed that the intended appeal may be arguable, however denial of stay may not render it nugatory; there was no positive order that was capable of being stayed; all the appointments had lapsed by 8th June 2021 rendering the court's order in vain. However, in the event we were inclined to allow the motion it should be on condition that the appointments are filled through a competitive process including advertisement and interviews.

9. In its written submissions, the applicant maintained that: it had an arguable appeal, the grounds raised therein were substantial and weighty, the trial court erred in failing to apply a purposive interpretation of Articles 10 and 232 of the Constitution; in considering this application we should be guided by the principles set out in the case of *National Bank of Kenya Linited v. Geoffrey Wahome Muotia* on arguability of the appeal and that only one arguable ground should suffice. We were urged further that the respondents would not suffer any prejudice in the event the orders were granted. We were called upon to consider the importance of public interest and to balance the competing rights in granting or not of the interim order of stay sought. In support of this proposition we were referred to the case of *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others* and the Canadian Supreme Court case of *Republic v. Oakes* .

10. It was further submitted that the affected institutions could not offer services to the public and its employees had not been paid salaries because the boards had insufficient number of board members to approve expenditure and that the appeal may be rendered nugatory if the order sought is not granted for the reason that the positions may remain vacant for an indefinite period of time as the provisions under which new appointments may be made were declared unconstitutional.

11. Further we were called upon to see that a lacuna had been created in the various provisions of the law which had been nullified. Thus the boards affected could not be reconstituted since the provisions have to be amended before new appointments are made, which amendment is undertaken by Parliament and there cannot be specific time frame within which those amendments can be effected.

12. The 1st and 2nd respondents on their part submitted that the intended appeal may be arguable. However they posited that it could not be rendered nugatory in the absence of stay for the reason that the judgment of the trial court was incapable of being stayed or executed as no positive order was made; granting stay in the circumstances shall be reversing the judgment and suspending the articles of the Constitution found to have been violated; the appointments had lapsed and that stay would harm the public interest and violate the Constitution further. In support of these arguments we were referred to the cases of *Lake Victoria South Water Services Board v. Seline akoth Oyiengo* & *Raphael Kakenei Muloki &another v. Cabinet Secretary of Lands & 2 others* . Finally, it was submitted that the applicant had not laid a proper basis for it to benefit from the discretion of this court in granting the orders sought.

13. The 3rd respondent in its written submissions supported the motion. We were urged to find that the impugned judgment has brought to a total halt the operations of the state organs especially, the approval of expenditure, and as such the state organs have been unable to perform critical services to the public as conferred on them by the statutes; that the employees to these organs have not been paid salaries due to lack of quorum in the governing boards to approve recurring expenditure; that an interim stay would ensure that there is continuity of services to the public, that the affected statutes have to be amended before new appointments are made. On public interest, we were once again referred to the case of Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others (Supra). Finally, it was submitted that the applicant had demonstrated it had an arguable appeal in view of the issues raised and that the intended appeal may be rendered nugatory in the absence of stay.

14. We have considered the application, the rival affidavits, the various grounds in opposition to the application, rival submissions, authorities cited and the law. The notice of appeal dated 2nd June, 2021 was duly filed pursuant to Rule 75 of the Court of Appeal Rules, thus giving this court jurisdiction to entertain the motion. (See *Safaricom Ltd. v. Ocean View Beach Hotel Ltd & 2 Others*).

15. The application is premised on Rule 5(2) (b) of this court's rules.

16. The purpose of this rule is to preserve the substratum of the appeal. The principles that apply to applications of this nature are well known. First the applicant has to demonstrate that the appeal or intended appeal as the case may be, is arguable and secondly, that in the absence of stay, the same shall be rendered nugatory. These principles were succinctly set out and crystallized in the case of *Stanley Kang'ethe Kinyanjui v. Tony Ketter & 5 Others* .

17. We have already set out elsewhere in this ruling the applicant's main complaints and which it intends to argue in the appeal. We need not reiterate them here. Suffice to say that they are not idle.

18. To establish an arguable appeal, the applicant is not obliged to establish a multiplicity of grounds, it will suffice even if only one arguable ground is raised as was held in *Silverstein v. Chesoni* . This one ground does not have to succeed but one which ought to be fully argued before the court as was held in *University of Nairobi v. Ricatti Business of East Africa* .

19. Indeed, the 1st and 2nd respondents have conceded that the intended appeal may be arguable. We are thus satisfied that the applicant has met the requirements of the first limb.

20. On the nugatory aspect, the applicant must establish that in the absence of stay and the judgment and decree of the trial court is executed the appeal will be rendered nugatory. The applicant maintains that the findings of the trial court had paralyzed the operations of the state corporations and parastatals on account of lack of proper quorum as required under Section 81(e) and (f) of the *State Corporations Act.* It is further urged that the provisions pursuant to which the affected appointees could be replaced had been declared unconstitutional and therefore the appointing authorities could not use them to make any other appointments. These facts have not been disputed by the 1st and 2nd respondents. Further there is the aspect of public interest. The Supreme Court in the case of Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others (supra) considered the question of public interest and observed as follows:

> "[89] This third condition is dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through the Constitution. This Court has already ruled that election petitions are both disputes in personam and disputes in rem. While an election petition manifestly involves the contestants at the poll, the voters always have a stake in the ultimate determination of the dispute, hence the public interest."

21. The Supreme Court further stated as below with regard to balancing of competing interests;

> "[95] The applicant's prayer in this case is, in its essence, a conservatory order: to the effect that during the pendency of the appeal, the current occupancy of the Governor's office be maintained; and the motion towards new elections be held in abeyance.
>
> [96] Although learned counsel have urged their case partly on the basis that the applicant, by virtue of Article 38 of the Constitution, has the "right to hold office", we do not perceive this case as a "private-interest matter"; for the public interest in fairly-conducted elections, and in legitimate office-holding, looms larger still.
>
> [97] Bearing in mind the nature of the competing claims,against the background of the public cause, we have focused our perception on the public interest, and the concept of good governance, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the Courts, by their established attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources."

22. By declaring the appointments unconstitutional the appointees can no longer conduct any business of the concerned corporations and Parastatals. The citizens of this country look upon these institutions to provide services and in the absence of board members then they shall remain in operational and in limbo for unspecified time. Some of the parastatals are strategic whereas others impact on the economy of the country. No new appointments to the boards can be made unless and until amendments to the impugned statutes are effected by parliament and nobody knows when this will be done. This state of affairs is obviously not in the public interest.

23. The competing interest here is compliance with the Constitution, appointing authority and the public interest. It has not been discounted that some of the corporations and parastatals have been unable to transact business with the consequences that some expenditures such as salaries have not been approved. Thus some employees of these organizations have for months gone without salaries. Such employees have been exposed to unnecessary hardships for no mistake of their own. Based on all the foregoing the 1st and 2nd respondents' argument that the judgment and decree is incapable of execution may not necessarily be right. Taking account into all that we have said in particular the question of public interest there is no doubt the intended appeal may be rendered nugatory in the absence of stay. In the premises we are satisfied that the applicant has met the threshold for the grant of stay. The 1st and 2nd respondents have suggested that in the event that we are inclined to allow the motion it should on condition that the appointments are made through competitive process including advertisement and interviews. We wonder under what legal regime such an exercise would be undertaken!

24. In the ultimate we order that there shall be a suspension and stay of execution of the judgment and decree of the trial court pending the hearing and determination of the appeal, which we understand has already been filed. Further, and for the avoidance of doubt, we order that the status quo to be maintained as regards the impugned sections and provisions of the Acts specified in Paragraph 122 (b) of the judgment of the trial Court of 27th May 2021, shall be that the said sections and provisions of the law shall continue to be in force and to operate pending the hearing and determination of the appeal.

25. The costs of this application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

NYAMWEYA

.....

JUDGE OF APPEAL

MUMBI-NGUGI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Signed

DEPUTY REGISTRAR