



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, GATEMBU & M'INOTI J.J.A.)

CIVIL APPLICATION NO. 59 OF 2018 (UR 51/2018)

BETWEEN

BEN CHIKAMAI.....1ST APPLICANT

THE BOARD OF DIRECTORS

KENYA FORESTRY RESEARCH INSTITUTE.....2ND APPELLANT

AND

PETER MACITHI MUIGAI.....1ST RESPONDENT

THE CABINET SECRETARY, ENVIRONMENT, NATURAL RESOURCES &

REGIONAL DEVELOPMENT AUTHORITIES..... 2ND RESPONDENT

THE ATTORNEY GENERAL..... 3RD RESPONDENT

(Application for stay of execution pending the hearing and determination of an intended appeal from the judgment and decree of the Employment and Labour Relations Court at Nairobi (Wasilwa, J.) dated 31st January 2018 in

Pet No. 75 OF 2016)

RULING OF THE COURT

This ruling determines an application brought by the **1st applicant, Ben Chikamai** and the **2nd applicant, the Board of Directors, Kenya Forestry Research Institute (KEFRI)**, under **rule 5(2)(b)** of the **Court of Appeal Rules** for stay of execution of the Judgment and Decree of the **Employment and Labour Relations Court (Wasilwa, J)** dated 31st January 2018, pending the hearing and determination of an intended appeal to this Court. By that judgment, the learned judge nullified the 1st applicant's appointment as the **Chief Executive Officer** of the KEFRI and ordered appointment of KEFRI's Board of Directors within six months, from the date of the decree. The decree was issued on the basis of the findings that the 1st appellant was in office contrary to the law and Government policy and also in violation of the competitive recruitment process demanded by the **Constitution**. As for the Board, the order for appointment was based on a finding by the court that there was no Board of Directors in office at the material time.

The two applicants were aggrieved by that decision and filed a Notice of Appeal on 5th February 2018, evincing intention to appeal to this Court. On 6th March 2018, they filed the Motion on Notice now before us, in which they seek, in the interim, an order of stay of execution of the said decree. By the time of the hearing of this application, the term of office of the 1st respondent had expired by effluxion of time on 30th April 2018. The appellants' counsel therefore, and very properly in our view, abandoned the prayer for stay of execution of the decree as concerns the 1st appellant, which he conceded was largely academic. However, as regards the 2nd respondent, it was contended that the issue was still live because the court directed the appointment of a Board of Directors of KEFRI in total ignorance of the fact that a Board was already validly in office.

The short background to the application is as follows. On 5th May 2016, the **1st respondent, Peter Macithi Muigai**, who describes himself as the Executive Director of **Kivuli cha Haki**, a Non-Governmental Organization for safeguarding and enhancing social, political and economic welfare of all citizens, filed a petition in the Employment and Labour Relations Court contending that the 1st applicant's appointment as the Chief Executive Officer of KEFRI was not competitive as required by the law and Government policy set out in the **Code of Governance for**

State Corporations (Mwongozo) and was in breach of the values and principles of the Constitution. He also alleged that there was no Board of Directors of KEFRI in office at the material time. Accordingly he sought, by way of relief, a declaration that **the 2nd respondent, the Cabinet Secretary for Environment, Natural Resources and Regional Development** and the

Board of Directors, KEFRI, had violated **Article 10** of the Constitution (**National Values and Principles of Governance**) and **Article 232 (Values and Principles of Public Service)** and a declaration that the 1st applicant was in office illegally. He however did not seek any relief as regards the Board, which he alleged was not in office.

The applicants opposed the petition and explained that the 1st appellant was first appointed for a term of three years on 1st May 2009 and due to his performance and achievements, his appointment was renewed for a further term of three years to 30th April 2015. They added that **Government Circular Ref. No. OP/CAB.9/1A** of 23rd November 2010 allowed the 1st appellant to apply to the 2nd appellant, at least 6 months before the expiry of his term, for further extension of his contract, which he duly did on 15th September 2014. His application was considered by the 2nd respondent and upon evaluation of his performance, he scored **4.98 points** out of a possible maximum score of **5.0 points**, leading the 2nd appellant to recommend to the 2nd respondent, extension of his term. The 2nd respondent acceded to the request and on 10th April 2015, renewed the 1st applicant's contract for a further term of three years until 30th April 2018. They added that the 1st appellant's last appointment was effected before *Mwongozo* came into force on 28th April 2015, and therefore the 1st appellant was appointed to office procedurally and within the law and Government policy as it then stood.

The 2nd respondent also opposed the petition vide an affidavit sworn by the then Cabinet Secretary, **Prof. Judi W. Wakhungu**, who reiterated the position taken by the applicants.

In issuing the decree that has aggrieved the appellants, the learned judge held that *Mwongozo* required the Chief Executive Officer of a State Corporation to be appointed competitively and a member of a Board to serve a maximum of two terms of three years each. She found that the 1st appellant's appointment was in violation of *Mwongozo*, whose provisions the applicants and the 1st respondent were or should have been aware of. As already adverted, she also held that there was no Board in office for KEFRI as of the date of the decree.

Prosecuting the application for stay of execution, the applicants' learned counsel, **Mr. Ligunya** submitted that the intended appeal was arguable because the learned judge erred by: applying *Mwongozo* to the respondent retrospectively; holding that the 1st applicant's re-appointment was contrary to *Mwongozo* whilst he was reappointed on 10th April 2015 before *Mwongozo* came into effect after 28th April 2015; ignoring the fact that the renewal of the 1st applicant's contract was based on existing statute law and policy; violating the 1st applicant's legitimate expectation; holding that there was no KEFRI Board in office whilst in fact there was already a Board in office, and by ignoring evidence on record showing that the Board was appointed on 30th May 2016 vide **Gazette Notice No. 4477**, for a term of three years which was yet to expire.

On whether the appeal would be rendered nugatory if it succeeded in the absence of an order of stay of execution, the applicants contended that their appeal would be rendered nugatory because execution of the decree would mean appointment of a Board whilst one was already in office since 30th May 2016. Such appointment, it was contended, would lead to great confusion and violation or breach of accrued legal rights and obligations. It was also contended that the Board in office had already made decisions which stood to be challenged, leading to great losses and damage to KEFRI.

The 1st respondent did not file a replying affidavit in opposition to the application and neither himself nor his advocates appeared for the hearing of the application, although the latter were duly served with a notice of hearing. For their part, the 2nd respondent and the **Attorney General (the 3rd respondent)**, who were represented by **Mr. Odukenya**, learned counsel, supported the application and adopted the applicants' submissions.

As we have already pointed out, this application is limited to stay of execution of the part of the decree directing appointment of a Board of Directors for KEFRI, the 1st appellant's impugned last term of office having expired by effluxion of time on 30th April 2018. It is trite that to be entitled to an order of stay of execution under rule 5(2)(b) of the Court of Appeal Rules, an applicant must satisfy the Court that the intended appeal is arguable and further that it will be rendered nugatory or academic if it succeeds in the absence of an order of stay of execution. (See **Jaribu Holdings Ltd v. Kenya Commercial Bank Ltd, CA. No. 314 of 2007**). In the absence of a replying affidavit or submissions in opposition to the application, the applicant's averments stand unchallenged and uncontroverted.

We are satisfied that the issues that the applicants intend to argue on appeal are not frivolous and deserve an opportunity to be considered by this Court on merit. In particular the issue whether the learned judge ignored or misapprehended the evidence on record showing that there was already a Board in office for almost two years before the decree is an arguable point and needs to be determined on merit by this Court. As has been stated time without number, an arguable appeal is one that raises even one *bona fide* point that deserves to be considered. Such an appeal need not ultimately succeed when it is heard. (See **Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union, CA. No. Nai. 72 of 2001**).

We are equally satisfied that unless we issue an order of stay of execution, the intended appeal will be rendered nugatory if it eventually succeeds. Whether or not a successful appeal will be rendered nugatory depends on the circumstances of each case, but the overriding consideration is to ensure that a successful party's victory is not rendered a mere pyrrhic victory, one that is worth nothing because the damage that the applicant apprehended has come to pass as an irreversible reality, or one that requires great expense to put right. (See **Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others, CA No. 31 Of 2012**).

The appointment of a Board as directed by the learned judge will have serious ramifications for KEFRI, which intends to argue in the appeal that it has a validly appointed Board already in office and has had that Board since 30th May 2016. We should in the circumstances lean in favour of an order that does not occasion any confusion or irreparable loss and damage pending the hearing and determination of the appeal.

Ultimately, we are satisfied that the applicants have established that they have an arguable appeal and that it will be rendered nugatory unless we grant an order of stay of execution. Accordingly this application succeed and an order is hereby issued staying execution of the decree of

the Employment and Labour Relations Court dated 31st January 2018 to the extent that it directs the appointment of a Board of Directors for KEFRI. Costs of this application shall abide the outcome of the intended appeal. It is so ordered.

Dated and delivered at Nairobi this 11th day of May, 2018

E. M. GITHINJI

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR