Katiba Institute v Attorney General & 9 others (Civil Application 201 of 2018) [2018] KECA 115 (KLR) (16 November 2018) (Ruling)

Katiba Institute v Attorney General & 9 others [2018] eKLR

Neutral citation: [2018] KECA 115 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 201 OF 2018

DK MUSINGA, SG KAIRU & JO ODEK, JJA

NOVEMBER 16, 2018

BETWEEN

KATIBA INSTITUTE ..... APPLICANT

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

PUBLIC SERVICE COMMISSION ..... 2ND RESPONDENT

NATIONAL ASSEMBLY OF THE REPUBLIC OF KENYA ..... 3RD RESPONDENT

JUDICIAL SERVICE COMMISSION ..... 4TH RESPONDENT

PATRICK GICHOHI ..... 5TH RESPONDENT

OLIVE MUGENDA ..... 6TH RESPONDENT

FELIX KOSKEI ..... 7TH RESPONDENT

DR GEORGE LUKOYE ..... 8TH RESPONDENT

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS . 9TH RESPONDENT

AFRICAN CENTRE FOR OPEN GOVERNANCE ..... 10TH RESPONDENT

(Being an application for conservatory orders prohibiting the 4th respondent and its agents from swearing-in the 5th, 6th and 7th respondents as members of the Judicial Service Commission pending the hearing and determination of an intended appeal from the Judgment of the High Court of Kenya at Nairobi (Mwita, J.) dated 6th July 2018 in Petition No. 84 of 2018)

RULING

1. By a Constitutional Petition dated 8th March 2018, the applicant, Katiba Institute, filed suit contending that the nomination of the 5th, 6th and 7th respondents as members of the Judicial Service Commission (JSC) is bereft of fair competition or merit and is contrary to Article 232(1) (g) of the *Constitution*. The applicant averred that the identification and nomination of the 5th, 6th and 7th respondents was not preceded by public participation and was therefore null and void. It was further contended that the President of the Republic forwarded the name of the 5th respondent to be vetted by Parliament yet the nomination was ultravires Article 171 (2) (g) of the *Constitution*. In the Petition, the applicant claimed the National Assembly in vetting the 6th respondent failed to interrogate the mandatory considerations in Section 7 of the *Public Appointment (Parliamentary Approval) Act* 2011 and failed to appreciate that the nomination and vetting of the 6th respondent did not meet the standard of strict scrutiny set out by case law.

2. Overall, the applicant contended that the appointment of the 5th, 6th and 7th respondents amounted to an unconstitutional exercise of state authority and violated national values and principles of governance and was a direct threat to judicial independence secured under Articles 160 (1) and 172 (1) of the *Constitution* and that the nomination and appointment of the 5th, 6th and 7th respondents was conceived and executed as a means to interfere with the functions of the JSC.

3. In the Petition, the applicant sought, inter alia, a declaration that the nomination, vetting, approval and appointment of the 5th, 6th and 7th respondents as members of the JSC was unconstitutional and invalid; a permanent injunction prohibiting the President of the Republic from appointing or gazetting the 5th, 6th and 7th respondents as members of the JSC and an order invalidating the nomination, approval and appointment of the 5th, 6th and 7th respondents as members of the JSC.

4. The respondents opposed the Petition filed before the trial court.

5. Upon hearing the Parties, the learned judge partially allowed the Petition and dismissed the rest of it with no order as to costs. In dismissing the rest of the Petition, the judge expressed himself as follows:

> " Having given consideration to this Petition, the Constitution, the law and precedent, I agree with the Petitioner to the extent only that the 2nd interested party (Patrick Gichohi) did not require approval by the National Assembly and that the National Assembly was wrong in vetting and approving him. Regarding the appointment of the 3rd and 4th interested parties (Olive Mugenda and Felix Koskei respectively), there was no violation of the Constitution. I am also unable to find constitutional invalidity in Section 15 (2) of the *Judicial Service Act*. (Emphasis supplied).
>
> (a) A declaration is hereby issued that there is no requirement for approval of the 2nd Interested party, the nominee of Public Service Commission under Article 171 (2) (g) of the *Constitution*; and the approval by the National Assembly made in this regard is of no effect.
>
> (b) The rest of the petition is, however, dismissed with no order as to costs."

6. Aggrieved by the dismissal of the rest of the Petition, the applicant has filed the instant application by Notice of Motion dated 12th July 2018 under Rule 5 (2) (b) of the *Rules of this Court*. The applicant is seeking a conservatory order prohibiting the 4th respondent and its agents from swearing-in the 5th,

6th and 7th respondents as members of the JSC pending the hearing and determination of an intended appeal from the judgment of the High Court of Kenya.

7. The grounds in support of the Motion are that:

   (a) The intended appeal is arguable in that the learned judge disregarded pleadings, the evidence on record and submissions by counsel; the judge erred in segregating Articles 171 and 250 of the *Constitution* from Articles 10 and 73 (2) (a) of the Constitution and failed to adopt a holistic interpretation of the *Constitution*.

   (b) The intended appeal shall be rendered nugatory if a conservatory order is not granted as there is real likelihood that the 5th, 6th and 7th respondents may be sworn into office in further violation of the *Constitution*; failure to issue a conservatory order would ultimately make the Court's final decision a mirage as there can be no use of a successful appeal if the 5th, 6th and 7th respondents have been sworn into office thus rendering constitutionality of their appointment an academic exercise; that a conservatory order is the only way to balance the competing interests of the parties and hold even the scales of justice and to facilitate a just, affordable and proportionate resolution of the intended appeal and

   (c) Public interest tilts towards grant of a conservatory order as there is no greater public interest than ensuring the dictates of the *Constitution* are adhered to; that a conservatory order helps to preserve the sanctity of the *Constitution*.

8. All the respondents, except the 8th, 9th, and 10th respondents and the JSC, the 4th respondent, opposed the instant application. JSC did not take a position on the application.

9. At the hearing of the application, the following learned counsel appeared for the parties: Mr. Ochiel for the applicant; Mr. Waweru Gatonye and State Counsel Mr. Maurice Ogosso for the 1st, 2nd and 5th respondents; Mr. Isaac J. M. Wamasa for the 4th respondent; Mr. James Nyiha for the 6th respondent; Mr. Charles Dulo for the 7th respondent and Senior Counsel Dr. John K. Khaminwa for the 9th and 10th respondents and holding brief for Ms Ngesa for the 8th respondent.

10. The application for a conservatory order was supported by the applicant as well as the 8th, 9th and 10th respondents. The 1st, 2nd, 3rd, 5th, 6th and 7th respondents filed replying affidavits opposing the application. Written submissions and list of authorities were filed in the matter.

11. In a preliminary observation, counsel for the applicant submitted that the instant application is for a conservatory order and not an application for stay of execution under Rule 5 (2) (b) of the *Rules of this Court*. Counsel noted the trial judge did not make any positive order and consequently, an order for stay of execution cannot issue. We concur with counsel that the judgment of the trial court did not order anyone to do anything. In *Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah* [2008] eKLR, this Court while considering an application for stay of execution of a negative order held as follows:

> " The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs."

12. In *Western College of Arts and Applied Sciences v Oranga & Others* (1976-80) 1 KLR, the Court of Appeal for East Africa stated as follows in relation to an application for stay of execution of a negative order:

> "But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs."

13. In *Raymond M. Omboga v Austine Pyan Maranga* Kisii HCCA No 15 of 2010, it was expressed that :

> "the order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order. The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise."

14. In the instant case, the applicant in seeking a conservatory order submitted that the essence of a conservatory order is well captured in the case of *Butt v Rent Restriction Tribunal* (1979) eKLR where it was expressed that a court ought to see to it that an appeal if successful, is not rendered nugatory and that availability of better remedy to the applicant at the conclusion of the proceedings is no bar to a conservatory order. Counsel further submitted that the essence of the jurisdiction of this Court under Rule 5 (2) (b) is to protect the subject matter of appeal. The case of *Deynes Muriithi v Law Society of Kenya* (2016) eKLR was cited in which the Supreme Court observed that Rule 5 (2) (b) applications arise at an interlocutory stage and orders issued therein are for the purpose of protecting the subject matter of the appeal.

15. On the merits of the instant application, the applicant urged that the intended appeal is arguable as it evinces cognizable controversies; the draft memorandum of appeal attached to the application raises legitimate questions for resolution by this Court; the intended appeal is arguable as the trial court disregarded pleadings, segregated Article 171 and 250 of the Constitution from Articles 10 and 73 (2) (a) and thereby arrived at a wrong decision; the findings of the judge were ultra vires the appointment of the 5th respondent. Counsel submitted that the issues raised in the draft memorandum of appeal are not only arguable but weighty touching on the correct interpretation of Articles 10 and 73 (2) (a) of the *Constitution*.

16. It was further submitted that the intended appeal shall be rendered nugatory if a conservatory order is not granted. Counsel cited dicta from *Charterhouse Bank Limited v Central Bank of Kenya* [2007] eKLR wherein it was stated that an applicant must satisfy this Court that an intended appeal is not frivolous. Counsel submitted that the validity of the appointment, vetting, swearing and the tenure of the 5th, 6th and 7th respondents is the subject matter of the judgment and intended appeal; the applicant seeks a conservatory order to stop their swearing to preserve the status quo and conserve the subject matter of the intended appeal. Counsel urged that if the 5th, 6th and 7th respondents are sworn in, the intended appeal shall be rendered an academic exercise and the substratum of the appeal would fundamentally be altered as they would have become members of the JSC with attendant claims of safeguards against removal.

17. The applicant finally submitted that public interest weighs heavily and tilts in favour of granting a conservatory order; that no prejudice will be suffered by the respondents if a conservatory order is granted because the 4th respondent, the JSC, is quorate to discharge its constitutional mandate; that any prejudice cause by grant of a conservatory order can be mitigated by expedited hearing of the intended appeal.

18. Senior Counsel Dr. Khaminwa for the 8th, 9th and 10th respondents while associating with submissions of the applicant supported the application for a conservatory order. He urged that one of the arguable points in the intended appeal is the statement by the trial judge that "it is not all appointments to public office that involve public participation." Counsel submitted that this statement is arguable and the intended appeal provides an opportunity to interrogate the legality of the statement. Counsel submitted that the issues urged in the intended appeal are of public interest and as such, public interest dictates that a conservatory order be issued.

19. The 1st, 2nd, 3rd, 5th, 6th and 7th respondents opposed the application. The 1st, 2nd and 5th respondents filed grounds of opposition. Counsel reiterated that there are no positive orders made by the trial court and as such a conservatory order cannot issue. It was submitted the applicant has not met the threshold and criteria for grant of an order under Rule 5 (2) (b) of the *Rules of this Court*; that the applicant has sought to reverse the substantive orders of the High Court at an interlocutory stage; no prima facie case has been established to warrant issuance of a conservatory order; the applicant has not demonstrated by way of empirical evidence any prejudice it will suffer if the order sought is not granted; the applicant has not demonstrated the nature of public interest that will be served in granting any conservatory order and that the impugned orders of the High Court involve interpretation of Article 172 (2) (g) and (h) of the *Constitution* as well as Section 15 (2) of the *Judicial Service Act* and any interference with the trial court's orders should only be made in a substantive appeal and not in an interlocutory application.

20. Counsel submitted that a conservatory order is a remedy aimed to facilitate ordered functioning within public agencies. Counsel cited the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji &2 others*, [2014]eKLR where it was stated that conservatory orders should be granted on inherent merit of a case bearing in mind public interest, the constitutional values and the proportionate magnitudes and priority levels attributed to the relevant causes. It was submitted that the applicant has not demonstrated any proportionate magnitude or priority that would justify grant of a conservatory order.

21. On the merits of the present application, counsel for the opposing respondent's submitted that the intended appeal is not arguable since the judgment sought to be appealed against is a pronouncement on constitutional interpretation and there are no positive orders; that the applicant has sought a relief against a negative act that was not ordered by the trial court; the learned judge did not order the 5th, 6th or 7th respondents to be sworn or to take oath of office and hence there is no positive order to conserve or preserve; and the applicant cannot seek to preserve or prohibit that which was not ordered.

22. The opposing respondents further submitted that the intended appeal shall not be rendered nugatory if a conservatory order is not issued; the learned judge simply interpreted the constitutional provisions and until such time as such interpretation is set aside or varied, it remains law; an intended appeal cannot be rendered nugatory by applying the law as interpreted by a court with competent jurisdiction.

23. The opposing respondents further submitted that in this matter, public interest militates against grant of a conservatory order; the applicant has not demonstrated the greater public interest it alleges favour grant of conservatory orders; the nature of public interest that would be served by the grant of a

conservatory order cannot be discerned. On the contrary, it is in the public interest to have a fully constituted and properly functioning JSC.

24. In challenging this submission, the applicant urged that it is not in public interest to merely populate the JSC with persons who have not been appointed in accordance with the constitutional values and principles; that in fact, it is in the public interest that such unconstitutionally nominated and appointed persons should be restrained from taking office.

25. In opposing the application, counsel for the 3rd respondent submitted that whereas the intended appeal was not arguable, public interest militates against grant of any conservatory order. Counsel urged that JSC is composed of four categories of members under article 171 (2) of the *Constitution*; one of the category of membership is two (2) nominees – a man and a woman – representing public interest; that the 6th and 7th respondents are the man and woman representing public interest in JSC; that as presently constituted and despite having a quorum, JSC has no representation from the public. Counsel urged that it is in the public interest not to grant any conservatory orders to enable the 6th and 7th respondents take office and represent the public in the JSC. It was submitted that the applicant does not stand to suffer any irreparable damage if the orders sought are not granted.

26. Counsel for the 6th respondent in opposing the application urged that the powers of the President to nominate and appoint a Commissioner pursuant to Article 171 (2) (h) of the *Constitution* is exclusive and not subject to direction of any person provided the appointee meets the criteria set out in the Article; the applicant's intended appeal is not arguable as it an attempt to fetter the direct and exclusive powers of the President as conferred by the *Constitution*; the applicant is attempting to get this Court to re-write the *Constitution* and fetter the President's powers.

27. On nugatory aspects, the 6th respondent submitted that the intended appeal shall not be rendered nugatory if the orders sought are not granted. It was urged that even if the 5th, 6th and 7th respondents are sworn in, there is a constitutional procedure in Article 251 (2) of the *Constitution* for removal of a Commissioner from office. Commenting on submission by the applicant that if a conservatory order is not granted this Court will be faced with a fait acompli, counsel urged that this is a misapprehension of the law. If the intended appeal succeeds, even if the respondents have been sworn and have taken office, this Court has power to declare that the nomination and appointment of the 5th, 6th and 7th respondents as unconstitutional and this will have a retroactive effect rendering their nomination and appointment null and void. On this footing, this Court shall not be presented by a fait acompli if the respondents are sworn and the intended appeal shall not be rendered an academic exercise if a conservatory order is not granted.

28. The 7th respondent urged the intended appeal is not arguable. On nugatory aspects, it was submitted that in the draft memorandum of appeal, the applicant has not cited any ground vitiating nomination and appointment of the 7th respondent with the consequence that there is neither an arguable appeal nor an intended appeal that can be rendered nugatory in so far as relates to the 7th respondent.

29. We remind ourselves that issuance of a conservatory order is at the discretion of this Court. We have considered the oral and written submissions by all counsel and the authorities cited. We appreciate that this is an application for a conservatory order and not an application for stay of execution. We bear in mind the dicta in *Butt v Rent Restriction Tribunal* (1979) eKLR where it was expressed that a court

ought to see to it that an appeal if successful, is not nugatory. In *Wilson v Church* (No 2) 12 Ch D (1879) 454, Cotton LJ said at p 458:

> "I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory."

30. In an application for conservatory orders, one of the issues to be determined is whether the intended appeal is arguable. An arguable appeal is not one which must succeed, it is sufficient if a single bonafide arguable ground of appeal is raised. (See *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004).

31. In the instant matter, both the applicant and all respondents have demonstrated and pointed to us arguable points of law that merit to be canvassed in the intended appeal. For instance, whether the judge erred in interpretation of the Constitutional Articles as well as interpreting Section 15 (2) of the *Judicial Service Act* is arguable; if the judge erred in stating that there are some public appointments that do not evince public participation is arguable. From these examples, we are satisfied that the intended appeal is arguable.

32. The next issue is whether the intended appeal shall be rendered nugatory if the conservatory order sought is not granted. An appeal is rendered nugatory if it will be rendered an exercise in futility. In *Reliance Bank Ltd v Norlake InvestmentsLtd* [2002] 1 EA 227 at page 232 it was expressed that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

33. The nugatory approach was considered in *Wilson v Church* (No: 2) (1879) 12 Ch D 454, over one hundred and thirty years ago. Comparatively in *Serangoon Garden Estate Ltd v Ang Keng* (1953) MLJ 116, it was stated that the nugatory approach and merits of the intended appeal requirement are distinct and mutually exclusive to one another in that one without the other would not be sufficient to constitute special circumstances that justify a conservatory order.

34. In the instant matter, the applicant submitted that if a conservatory order is not granted, there is possibility of the 5th, 6th and 7th respondents taking oath of office and this Court shall be presented with a fait acompli. If they are sworn into office, the substratum of the intended appeal shall fundamental change. If sworn, the intended appeal will be rendered nugatory because as Commissioners, the respondents can only be removed from office pursuant to Article 251 (2) of the *Constitution* and which Article is not the subject of these proceedings.

35. The submission that the intended appeal will be rendered nugatory has no merit. The 5th, 6th, 7th respondents were nominated, appointed and vetted by the Parliament. The High Court, having hard and determined the petition challenging their nomination has cleared them. Article 252 of the *Constitution* provides the procedure for removal of a member of an Independent Commission. Even the applicant in its draft memorandum of appeal appreciates that this Court has power to nullify and declare the nomination of the 5th, 6th and 7th respondents to be invalid. In the draft memorandum, the applicant prays in the alternative that this Court do issue an order invalidating the nomination, approval and appointment of the 5th, 6th and 7th respondents, as the case may be, as members of the JSC. This alternative prayer perforce acknowledges that even if the 5th, 6th and 7th respondents were to be sworn in and take office, this Court has power to invalidate their membership to the JSC. If it is ultimately found that the nomination of the 5th, 6th and 7th respondents is valid, we opine that nothing would prevent the court from nullifying the same. See *Macfoy v United Africa Co. Ltd*. (1961) 3All E.R. 1169.

36. In the final analysis, the applicant has not satisfied us that the intended appeal shall be rendered nugatory if a conservatory order is not granted. We decline to grant the order sought with the consequence that the Notice of Motion application dated 12th July 2018 be and is hereby dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF NOVEMBER, 2018

D.K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR