



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, J. MOHAMMED & KANTAI, JJA.)

CIVIL APPLICATION NO. NAI 157 OF 2015 (UR 28/2015)

BETWEEN

COMMUNICATIONS AUTHORITY OF KENYA..... APPLICANT

VERSUS

ADRIAN KAMOTHO NJENGA.....1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF

INFORMATION & COMMUNICATION.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

CAROLE KARIUKI.....4TH RESPONDENT

WILBERT KIPSANG CHOGE.....5TH RESPONDENT

KENNEDY MONCHERE NYAUNDI.....6TH RESPONDENT

GRACE MWENDWA MUNJURI.....7TH RESPONDENT

PROF. LEVI OBONYO.....8TH RESPONDENT

HELLEN KINOTI.....9TH RESPONDENT

BEATRICE OPEE.....10TH RESPONDENT

PETER MUNYWOKI MUTIE.....11TH RESPONDENT

(An application for stay pending the hearing and determination of an intended appeal from the Judgment and order of the High Court of Kenya (G. V. Odunga, J.) dated & delivered on 29th May 2015

in

H.C. Misc. Appl. No. 401 of 2014)

RULING OF THE COURT

This is an application brought under **section 3A and 3B** of the **Appellate Jurisdiction Act** and **Rules 5(2)(b) and 42** of the **Court of Appeal Rules, 2010** for an order:

“staying the judgment and Decree of the superior court issued on 29th of May 2015.....pending the hearing and final determination of the intended appeal.”

The application is supported by the grounds embodied in the application and in the supporting affidavit of **John Omo** – the Director of Legal Affairs of the applicant. The application is opposed by **Adrian Kamotho Njenga** – the 1st respondent herein on the grounds contained in his replying affidavit sworn on 14th July 2015. However, the application is supported by the 2nd to 8th respondents.

The occurrence of vacancies in the office of the Chairperson or member of the Board of Communications Authority of Kenya (the applicant herein) is required to be filled in accordance with the procedure set out in section 6B of the Kenya Information and Communications (Amendment) Act (Act) 2013. That procedure is briefly as follows: -

1. Within fourteen days of the occurrence of the vacancy the President or the Cabinet Secretary as the case may be –
 - a. Shall by notice in the Gazette and on official website of the Ministry declare a vacancy in the Board and invite applications from qualified persons.
 - b. Convene a selection panel for purposes of selecting suitable candidates for appointment
2. ...
3. An application in respect of a vacancy shall be forwarded to the election panel within seven days of the publication of the notice.
4. The selection panel shall consider the application, shortlist and publish the names and qualifications of all applicants and those shortlisted by the panel in the Gazette and on official website of the Ministry within fourteen days from the expiry of the deadline of receipt of the applications.
5. The selection panel shall interview the shortlisted applicants within fourteen days from the date of publication of the list of shortlisted applicants.
6. Upon carrying out the interviews the selection panel shall select –
 - a. three persons qualified to be appointed as Chairperson; and
 - b. two persons in relation to each vacancy qualified to be appointed as members of the Board and shall forward the names to the President or the Cabinet Secretary as the case may be.
7. The President or Cabinet Secretary shall within fourteen days of the receipt of the names, by notice in the Gazette appoint the Chairperson and members respectively.

The Ministry declared vacancies by notice in the Gazette on 17th March 2014. A declaration of vacancy was done by notice in the Gazette dated 3rd April 2014 indicating the deadline for receiving applications to be 5.00 p.m. on 15th April 2014. The names of the shortlisted applicants were published in the Gazette on 24th April 2014. After the interviews, the 5th to 11th respondents herein were appointed as members of

the Board by Gazette notice published on 20th May 2014.

The 1st respondent who considered himself eligible for appointment as a member of the Board and who had been nominated by Information Communications Technology Association of Kenya made the application for appointment. However, his application was not considered allegedly for the reason that it was received after the deadline for receipt of applications. The 1st respondent being aggrieved filed an application for judicial review dated 24th October 2014 in which he sought an order of certiorari to quash the decision and Gazette Notice dated 24th April 2014 and 20th May 2014 short listing the candidates and appointing the members respectively. The 1st respondent also sought an order of mandamus compelling the Cabinet Secretary (2nd respondent herein) to disclose the full composition of the selection panel.

The application was supported by the various grounds contained in the statement, the relevant one being that the selection panel, acted *ultra vires* section 6B of the Act by publishing the list of applicants and shortlisted applicants on 24th April 2014 instead of 22nd April 2014, which was outside the stipulated seven days.

The High Court considered the application and made a finding in paragraph 63 and 65 of the judgment that the names of the applicants and shortlisted applicants ought to have been published latest by 22nd April 2014 but the names were published in the Gazette on 28th April 2014 and further that the appointment of the members of the Board ought to have been published latest by 20th May 2014, but were published on 30th May 2014. The dates 28th April 2014 and 30th May 2014 mentioned by the learned judge appear inconsistent with the evidence which refers to 24th April 2014 and 20th May 2014 respectively, as the dates the two events occurred.

The High Court stated in paragraph 69 as follows:

“In my view the 1st respondent’s decision was outside the timelines set out by the Act, this decision was arrived at without or in excess of jurisdiction and whatever proceedings flowed from the decision would be null and void since a decision made without jurisdiction must of necessity be null and void”.

By a judgment dated 29th May 2015 the High Court held that the appointment of the members of the Board was tainted with illegality in that they were appointed outside the statutory timelines and granted an order of certiorari in terms of the application.

The applicant intends to appeal against the decision and has filed a notice of appeal. For the Court to exercise its discretion in favour of the applicant, the applicant is required to satisfy the principles applicable to section 5(2)(b) applications, namely; that it should demonstrate that the intended appeal is arguable and that unless the application is granted, the appeal, if ultimately successful, would be rendered nugatory.

As regards the merits of the intended appeal the applicant has enumerated the grounds of intended appeal both in the application and in the draft memorandum of appeal. It is not necessary to set out or consider all the grounds of the intended appeal suffice to set out one of the main grounds which states:

“The learned judge failed to appreciate that there is no provision in the statute generally or the text of section 6(b) that shows that Parliament intended non-compliance with its time lines would lead to total invalidity”

Mr. Ahmednasir, Senior Counsel (SC) for the applicant relied on the case of **Regina v Soneji and Another [2005] UKHL 49** particularly the speech of **Lord Steyn** for the submission that the correct test for determining the issue of invalidity of an administrative action for non compliance with a procedural requirement in a statute is not whether the words used are mandatory or directory but rather whether Parliament intended that non compliance would result in total invalidity of the action in question. The

authority further shows that it does not follow that non compliance with procedural requirement as to time deprives the body of jurisdiction to make a determination.

The specific complaint of the 1st respondent as appears from the application for judicial review was that the publication of the list of candidates and shortlisted applicants was done outside the stipulated seven days and, not that, the appointment of the members of the Board on 20th May 2014 was done outside the stipulated period. It is clear that the gist of the intended appeal is the construction of section 6B of the Act and whether the consequences of non-compliance with the statutory timeline, if any, should have resulted in total invalidity of the appointment of the members of the Board.

The manner in which the High Court exercised its discretion to grant discretionary remedy having far reaching consequences is also the subject of the intended appeal.

The 1st respondent contends that the applicant has no *locus standi* to prosecute the application as it was averred in the replying affidavit filed in the High Court on its behalf that, it had no role in the selection, short listing and appointment of the members of the Board. However, it is a fact that it is the 1st respondent who joined the applicant herein as the 2nd respondent in the Judicial Review Application. The appointment of members of the Board of the applicant was in effect quashed by the High Court. The applicant is *prima facie* a person aggrieved within the meaning of Rule 75(1) of the Court of Appeal Rules and is entitled to file an appeal and make the present application.

From the foregoing we are satisfied that the applicant has *locus standi* to make the application and that the intended appeal is arguable.

The applicant states that the appeal, if successful, would be rendered nugatory unless stay is granted. It avers that the judgment of the High Court not only disbanded the entire Board but also had the adverse effect of crippling the entire operations of the applicant, and in addition, that the administrative decisions made by the Board prior to the judgment of the court would be open to legal challenges.

The 1st respondent contends, on the other hand, that the appeal would be rendered nugatory; that the Board functions are not full time; and that the statutory timelines would secure the selection of another Board within a period of 56 days and stem the possible perpetuation of an illegality.

The Board had been in operation for about one year before the impugned judgment of the High Court. If the timelines stipulated in section 6B of the Act are adhered to, members of the new Board would be appointed before the appeal is heard thus rendering the appeal nugatory. There is also the risk that the validity of the decisions of the Board for the past one year prior to the declaration of invalidity would be open to challenge with dire consequences including great economic loss.

Further, it is apparent that unless stay is granted, the functions of the applicant – a public body rendering vital services to the public and stakeholders, would be severely impeded. That would be against the public interest.

Mr. Kibathi for the 1st respondent raised an issue, in essence, whether the Court exercising jurisdiction under Rule 5(2)(b) can stay the execution of a quashing order.

Relying on the decision of this Court in **Attorney General v. Law Society of Kenya and Another [2009] eKLR**, he submitted that the High Court quashed the decision in the Gazette notice and that the order was directed at actions of the 2nd respondent. In the authority relied on by the 1st respondent's counsel, the High Court had nullified nine sections of the Work Injury Benefits Act. In an application brought under Rule 5(2)(b), the Attorney-General had sought an order, *inter alia*, that pending determination of the appeal, all claims relating to work injury be dealt with in accordance to Work Benefits Act, 2007 with liberty of the injured to pursue a common law claim, if the appeal does not succeed.

This Court dismissed the application saying in part:

“The orders made by Ojwang’ J. merely nullified certain sections of the Act. Those orders do not require the applicant to do or refrain from doing anything. We cannot in a motion for stay of execution, restore into operation the nullified sections; the effect of that would be to reverse the decision of the trial Judge on a motion for stay.”

Mr. Ahmednassir distinguished that decision from the instant case. He submitted that the decisions cited in that authority were made in commercial or tort cases which are different from judicial review cases and that what the applicant is asking the Court to do is to suspend the time for performance and to preserve status quo pending appeal.

The order sought in the application is quoted verbatim at the beginning of this ruling.

Apparently the applicants omitted the word “execution” and merely used the word “stay”. In our view, the use of the word “stay” without execution is not deliberate but rather an inadvertent omission seeing that the application is brought under Rule 5(2)(b) which uses the phrase “stay of execution” Thus, the application properly understood seeks a stay of execution of the judgment and decree of the High Court pending appeal

Rule 5(2)(b) gives the Court power to order a “stay of execution” without specifying the subject matter of the execution, thus leaving open the species of decisions of Court which may fall within the ambit of “execution” In private law, the superior court invariably makes decisions which result in clear decree which can be given effect to without any difficulty. In contrast, in public law including judicial review and in equity the remedies that the superior court can give are flexible and sometimes innovative. As an illustration, in the adjudication of Bill of Rights and as Article 23(3) of the Constitution provides, the High Court is given jurisdiction to grant appropriate relief including an injunction, conservatory order, declaration of invalidity, compensation and order for judicial review.

A party appealing from such decisions would be entitled to make an application for an order of stay of execution which is wide enough to encompass a stay of implementation of the decision or the preservation of status quo pending appeal.

The quashing order in question specifically declared the appointment of the Board a nullity and thus disbanded the members of Board. Although the court did not issue an order of mandamus compelling commencement of the process of appointment of members of the Board afresh, that was the inevitable consequence. Indeed the High Court said that starting the process afresh was not likely to cause chaos. An order of stay of execution of the quashing order in the sense of stay of implementation of the decision would leave the quashing order intact while preserving the status quo pending appeal. In our view the Court has power to grant such an order.

For the foregoing reasons, we allow the application and grant an order of stay of execution of the order of the High Court dated 29th May 2015 pending appeal as prayed. The costs of the application shall be costs in the appeal.

DATED and delivered at Nairobi this 31st day of July, 2015.

E. M. GITHINJI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR