

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E007 OF 2021

IN THE MATTER BETWEEN:

REPUBLIC.....APPLICANT

VERSUS

HON. ATTORNEY GENERAL.....1ST RESPONDENT

COMMUNICATIONS AUTHORITY OF KENYA.....2ND RESPONDENT

AND

HON. KEMBI GITURA.....INTERESTED PARTY

RULING

1. The *Ex Parte* Applicant has sought the grant of an order of stay to halt the impugned Gazette Notice, the subject of the Judicial Review before me. Mr. Kamotho for the *Ex Parte* Applicant ably argued that the interests of justice dictate that a stay order be granted to halt the stated illegality the *Ex Parte* Application seeks to correct. He argues that the proper procedure in appointment ought to be followed.
2. The Counsel for the 1st Respondent Miss Oyugi argues that the orders sought ought not be granted as the *Ex Parte* Applicant has not met the threshold for grant and further that there is a decision from the High Court in previously determined Petitions being Petition No. 284 of 2018 and 253 of 2018 – **The Senate of the Republic of Kenya & 4 Others v Speaker of the National Assembly & Another; Attorney General & Others as Interested Parties**. She asserts that the President can appoint the Interested Party having as he did. She thus urges the Court to decline granting the order until the motion is heard and determined.
3. The 2nd Respondent is also opposed to the grant of the orders. Mr. Githu Muigai SC appearing for the 2nd Respondent along with Mr. B. Ngige argues that the orders sought cannot be granted as the truncation being sought is anathematic to the precedent set in Judicial Review matters where stay ought to be sought at the stage leave is sought and if not granted is not amicable to grant as proposed by Mr. Kamotho. He argues further that the appointment sought to be halted has already taken place as the Interested Party is already in office and that the order that should commend itself for grant is one maintaining status quo.
4. In rejoinder, Mr. Kamotho argues that there was no suspension of the illegality of the appointment and wonders how the 1st Respondent is continuing to engage in illegal acts as once the High Court changed the rules of appointment there can be no means of sanity what the Court found unconstitutional. He submits that the Court maintains the liberty to give directions and orders varying the position obtaining in terms of Section 16 of the Employment and Labour Relations Court Act which gives this Court power to give orders necessary to meet the ends of justice. He submitted the scales of justice tilt in favour of preserving the Rule of law. He urged the Court not to turn a blind eye to what is clearly impunity and an illegality.
5. The *Ex Parte* Applicant through Counsel has articulated the issue of stay of the impugned Gazette Notice. As I know it, Judicial Review is concerned with not the merits of the decision making but the process. When a Party moves the Court it of necessity would seek to stay the impugned actions. I have perused the order of Nduma Nderi J. issued on 19th March 2021. The Learned Judge when giving leave to commence these proceedings did not give stay or order that such leave do operate as stay. In Judicial Review the failure to grant stay cannot be subject of a subsequent motion and as such the ship sailed when my brother declined to order that leave do operate as stay. Whereas the provisions of Section 16 of the Employment and Labour Relations Court Act give this Court power to issue such decrees, order and judgments as to meet the ends of justice, I am not persuaded that it is in the interests of justice to disturb the status quo now obtaining since at the end of the matter an order quashing the Gazette Notice can issue so as to right any wrong that may have occurred in the process of appointment, the *Ex Parte* Applicant asserts is illegal. In the premises, motion seeking stay made orally before me is denied with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL 2021

Nzioki wa Makau

JUDGE