



IN THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E006 OF 2021

IN THE MATTER OF: AN APPLICATION BY JOSEPH MWANGI FOR LEAVE TO APPLY FOR JUDICIAL REVIEW UNDER ORDERS OF MANDAMUS, CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: ARTICLES 10,19,20,21,22,23,25,27,28,29,47,48,50,165,189 AND 190 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF: WATER ACT, 2016

AND

IN THE MATTER OF: COMPANIES ACT 2015

AND

IN THE MATTER OF AN APPLICATION FOR RENEWAL OF TERMS OF SERVICE FOR THE MANAGEMENT DIRECTOR, GITHUNGURI WATER AND SANITATION COMPANY LIMITED

BETWEEN

JOSEPH MWANGI.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF KIAMBU

CHIEF EXECUTIVE COMMITTEE MEMBER (CECM)

WATER ENVIRONMENT, ENERGY AND NATURAL RESOURCES.....1ST RESPONDENT

THE BOARD OF DIRECTORS

GITHUNGURI WATER AND CO. LTD.....2ND RESPONDENT

WATER SERVICES REGULATORY BOARD.....3RD RESPONDENT

RULING

1. On 1.3.2021 I granted leave to the ex parte applicant to apply for the writ of Prohibition and Mandamus. I also fixed the application for inter parte hearing on 11.3.2021 with respect to stay order.
2. On the said date the applicant told the court that he had not yet served the application for stay and had also not filed the main motion. He therefore sought adjournment till 22.3.2021.
3. On the said date the Respondent confirmed receipt of the application for stay and the main motion and sought 7 days to file responses. The matter was then adjourned to 20.5.2021 to enable the Respondent file reply and all the parties to file written submissions to dispose of the stay application.
4. The applicant contends that the impugned decision was made by the Executive Committee member in charge of Water Management in bad taste and without legal authority; that the 1st Respondent is usurping and assuming the role of the 2nd Respondent after suppressing the Board from holding meetings or exercising its process under Clause 68 of the company's Memorandum and Articles of Association, and that Board has not yet reviewed his performance to determine whether or not renewal of his contract should be declined.
5. The Respondent contended that granting stay as prayed would prejudice the 1st Respondent because another person had taken the applicant's position on acting capacity and that means having two persons in one position. In the 1st Respondent's view, that state of affairs would amount to breach of public Finance Management Act and lead to disciplinary measures.

DETERMINATION

6. The question at hand is whether the court should direct that the leave granted on 1.3.2021 to apply for prohibition and mandamus should apply as stay of the impugned decision pending hearing and determination of the suit.
7. It is trite law that the purpose of stay pending the hearing of a Judicial Review application is to preserve the *status quo* and ensure that the judicial review proceedings, are not rendered nugatory.
8. In **R V Asworth Hospital Authority [2003]WLR 127**, the court held that:

“the purpose of a stay in a judicial review is clear. It is to suspend the “proceedings” that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success . . . the administrative court routinely grants a stay to prevent the implementation of a decision that has been made but not yet carried out, or fully carried into effect.”

9. In the instant case, the impugned decision is to the effect that the Claimant's fixed term contract would not be renewed because first the applicant failed to give the notice for renewal to the employer within the required time line, and secondly because there were many complaints against his performance leading to a rating of *“the poorest.”*
10. The Respondent contends that the status quo before filing the suit is that the Claimant's contract term had expired and the court cannot renew or extend the expired contract.
11. Having carefully considered the facts of the case, it appears that the JR proceedings herein seeks to reinstate the Claimant to his position as the MD for Githunguri Water and Sanitation company Limited and to bar the 1st Respondent from taking over the role of the Board of Directors of the company.
12. It is not this court's duty at this juncture to go to merits of the application. But as I observed at the leave state, the application is arguable and not frivolous. It raises serious issue of *ultra vires* actions by the 1st Respondent. Therefore I direct that the leave granted on 1.3.2021 shall operate as stay pending the hearing and determination of the suit in the following terms :

- a. **The 1st Respondent is barred from assuming the role of the 2nd Respondent in Managing and running the company.**
- b. **The appointment of Mr. Charles Wahongo as the acting Managing Director and other employees of the company appointed without lawful mandate shall not be confirmed.**
- c. **The Notice of Expiry of Contract dated 2.2.2021 to the applicant shall not take effect but the applicant will not report back to work unless by the invitation of+ the 2nd Respondent.**
- d. **Costs shall be in the cause.**

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 18TH DAY OF AUGUST, 2021.

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE