



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 58 OF 2020

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

IN THE MATTER OF: ARTICLE 23(3)(f) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015

IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE SELECTION PANEL FOR RECRUITMENT

OF THE AUDITOR-GENERAL.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th June, 2020)

RULING

I have considered the respective parties’ oral submissions on the prayer 5 of the Chamber Summons thus, “ **5. That pending the filing, hearing and the final determination of the substantive Judicial Review Notice of Motion herein, or until further Court orders, leave be granted do operate as a stay of suspension of the on going process of recruiting the new Auditor General, including the suspension of any shortlists of eligible candidates made by the 1st Respondent which contain names of person who were disqualified by previous selection panel.**”

The court makes findings as follows:

(1) Leave to apply for certiorari to quash any shortlist of eligible candidates made by the 1st respondent which contain names of persons who were disqualified by previous selection panel has been granted. Parties are in agreement shortlisting has been concluded. At this stage there is nothing before Court to doubt that the selection panel, the 1st Respondent, forwarded to the President 3 names per section 11(6) of the Public Audit Act and did so on 15/06/2020. The prayer for certiorari not having prayed for quashing of the shortlists and consequential processes on decisions such as forwarding the names to the President and consequential processes in the vetting by Parliament and appointment, the Court upholds Respondent’s submissions that looking at the prayer, there is nothing left of the prayer for certiorari to warrant the stay order. The court considers that the prayer for stay orders as made is not consistent with the leave granted for the order of certiorari as sought by the applicant.

(2) The leave was granted for application of prohibition to prohibit the respondents and other persons howsoever acting from implementing, giving effect to or enforcing any shortlist of eligible candidates made by the 1st Respondent which contains names of person who were disqualified by previous selection panel. The Court finds that indeed the prayer is consistent with the prayer for stay orders as prayed for and when prohibition is granted, if the Court is persuaded to grant, then it would be proper to grant the stay to arrest the process. However, parties are in dispute whether the previous panel disqualified some of the present shortlisted candidates except two as submitted for applicant. Parties also are in dispute whether the work of the pervious panel was binding upon the present selection panel. It is also not clear whether the candidates as may have been disqualified by the previous selection panel continue to be so disqualified. In such circumstances,

the Court finds that a *prima facie* case has not been established to grant stay orders as now prayed for.

(3) The Court considers that in the circumstances of the case the mentioned matters that are in dispute favour denial of the stay orders as prayed for. The Court particularly considers that the process should not be stayed in circumstances whereby it is not obvious or clear that unqualified persons have participated. While making that finding the Court considers that the process is still on-going and the constitution, and relevant legislation provides for avenues to remedy the grievance should stay orders be declined. That in this case existence of alternative process to remedy the grievance makes it not in public interest to grant the stay order.

In conclusion, the application for leave to operate as stay per prayer 5 in the Chamber Summons is hereby declined.

Signed, dated and delivered in court at **Nairobi** this **Friday, 19th June, 2020**.

BYRAM ONGAYA

JUDGE