



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW NO. 7 OF 2020

(Before Hon. Justice Hellen S. Wasilwa on 21st October, 2020)

KAMAU THUO FIUNIFU.....APPLICANT

VERSUS

NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD.....1ST RESPONDENT

THE NAIROBI CITY COUNTY ASSEMBLY.....2ND RESPONDENT

THE CLERK, NAIROBI CITY COUNTY ASSEMBLY.....3RD RESPONDENT

RULING

1. The Applicant filed a Chamber Summons dated 12/3/ 2020 seeking the following orders:-

1. Spent.

2. THAT the Applicant be granted leave to apply for the following orders of judicial review:-

a. An Order of Certiorari: to bring before this Honourable Court and quash the decision taken on or about the 19th of February, 2020 by Nairobi City County Assembly to appoint Fatuma Aden Affey and Willis Okello Oluoch as Members of Nairobi City County Assembly Service Board.

b. A DECLARATION that the decision taken on or about the 19th of February, 2020 by the Nairobi City County Assembly to appoint Fatuma Aden Affey and Willis Okello Oluoch as members of Nairobi City Council Assembly Service Board was unprocedural and illegal, and therefore null of no effect.

c. THAT the leave so granted operated operates as the stay of the decision taken on or about the 19th of February, 2020 by Nairobi City County Assembly to appoint Fatuma Aden Affey and Willis Okello Oluoch as members of Nairobi City County Assembly Service Board pending the determination of the judicial review application.

d. THAT the costs of the application be provided for.

2. The application is grounded on the Statutory Statement dated 12th March, 2020 and Supporting Affidavit sworn by Kamau Thuo Fiunifiu.

3. The Ex-parte Applicant contends that on 31st October, 2019, the Nairobi City County Assembly Service Board advertised a vacancy in the office and called for applications from members of the public of 2 positions of member, Nairobi County Assembly Service Board.

4. He contends that the said interview provided that interested persons where required to apply for the positions by 8th November, 2019 that is within 7 days as from 31st October, 2019. He contends that the advertisement was never published in the Kenya Gazette as required by the County Assembly Service Act 2017 under Section 17 and the First Schedule thereto.

5. He alleges that the 1st Respondent went on to shortlist candidates and interviews were conducted on 23rd January, 2020 after which the names of Fatuma Aden Affey and Willis Okello Oluoch were forwarded to the Nairobi County Assembly. That on 19th February, 2020 the

two persons were approved and appointed as members of the County Assembly Service Board.

6. However, that the Secretary of the Board in response to his request for information on the recruitment process was categorical that his office was neither consulted nor involved in the exercise.

7. He alleged that as per the provisions of Section 12 (3) of the County Government Act Nairobi County Assembly Service Board consists of 5 people who include the speaker, 2 members of the Nairobi County Assembly and 2 part time members. It is his allegation that on 30th October, 2019 the Court in **The Clerk, Nairobi County Assembly v The Speaker, Nairobi City County Assembly and Another Petition 194 of 2019** issued an order which was extended on 15th November, 2019 and is still in force barring the 2 members who were members of the Board from participating in the conduct of business of the Board.

8. He contends that as from 30th October, 2019 and 24th February, 2020 the Board comprised only the Speaker/Chairperson therefore it lacked quorum to transact business. He therefore avers that the 1st Respondent acted in contravention of due process and in bad faith thus whole recruitment exercise was tainted with illegality.

9. The 1st Respondent filed a Replying Affidavit sworn by Hon. Beatrice Kadeveresia Elachi, the then Chairperson of the Nairobi City Council Assembly Service Board on 7/8/2020. Though the Applicant in his submissions made reference to the Replying Affidavit of the 3rd Respondent, that affidavit was not available on the e-filing system.

10. The matter proceeded by way of written submissions but only the Applicant and the 1st and 2nd Respondents filed their respective submissions. The 3rd Respondent chose not to file submissions instead, his Counsel stated that he was in support of the Applicant's submission.

11. In her Replying Affidavit, Hon. Beatrice K. Elachi, deposes that under Order 53 Rule 3 and 4 of the Civil Procedure Rules, there is no motion to respond to and that the application is fatally defective and only warrants striking out.

12. She deposes that there was a Gazette Notice No. 7352 issued on 20/7/2018. She therefore deposes that the requirement of a gazette notice was fulfilled by the notice and intention of subsequent advertisement on the Daily Nation and Standard newspaper on 31st October, 2019. She avers that paragraph 2 of the First schedule of the County Assembly Services Act stipulates the period within which job applications are to be submitted as to be "within fourteen days" and not strictly 14 days.

13. She avers that the Clerk, Nairobi County does not form part of the Board as evidenced in Section 12 of the County Governments Act. She avers that the Clerk acts as an Administrative Assistant to the Board and could only act under her direction as per Section 20 (3) of the County Services Act, 2017. She therefore avers that the conduct of Jacob Ngwele should be investigated as his actions were neither directed by her nor done on behalf of the Board.

14. She avers that the Board consists of 5 members and 3 were present on the day in question including herself and 2 other members as appointed by political parties. She avers that the legality of the consent order in Petition No. 194 of 2019, which was filed is still active, is still in contention and as such cannot be relied upon until the matter is concluded.

15. She deposes that the interviews were conducted by the Public Service Commission without any internal or external influence. She deposes that the commission was guided by Article 10 of the Constitution of Kenya.

Applicant's submissions

16. The applicant submitted that the applicable law on leave to commence judicial review proceedings is Order 53 Rule 1 of the Civil Procedure Rules. He submitted that the reason for leave was explained in **Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMA No. 384 of 1996** as to eliminate an early stage of any frivolous applications for judicial review and ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

17. He further relied on the decision in **Sauti Communications Limited v Communications Authority of Kenya [2020] eKLR** where it was held that the Court ought not to delve deeply into arguments of the parties but should make a cursory perusal of the evidence and make a decision whether the Applicant's case is sufficiently meritorious.

18. He submitted that Section 9 (2) of the First Schedule of the County Assembly Service Act provides for the procedure for appointment of members of the Board appointed under Section 12 (3) (d) of the County Governments Act. He submitted that the recruitment process was conducted illegally as the 1st Respondent failed to advertise the notice of vacancies in the Kenya Gazette as required by the County Assembly Act.

19. He argued that the 3rd Respondent admitted in paragraph 9 of his Replying Affidavit that he never placed any notice in the newspapers or Kenya Gazette declaring the said vacancies in the Board. He further maintained that the invitation by the 1st Respondent allowed a time frame of 8 days as the deadline contrary to the mandatory provision of 14 days.

20. He submitted that this was irregular and unprocedural. He relied on the Court of Appeal decision in **Municipal Council of Mombasa v Republic & another [2020] eKLR** that Judicial Review is concerned with the decision making process and not merits of the decision.

21. He argued that the mandatory requirement of Section 16 and paragraph 5 of the second schedule of the County Assembly Service Act requires quorum of 3 member but the meeting of 30th January, 2020 has 2 members thus it was illegal, incurably defective and null and void.

22. He submitted that the applicable law on whether the leave should operate as stay is Order 53 Rule 1 (4) of the Civil Procedure Rules. He submitted that the impugned decision was on filing of positions that are part time in nature and that the decision is yet to be completed thus it is possible to suspend its implementation. He submitted that in **Republic v Capital Markets Authority ex parte Joseph Mumo Kivai & another [2012] eKLR**, the Court held that judicial review proceedings are public law proceedings for vindication of private rights thus public interest is a relevant consideration in granting orders.

1st and 2nd Respondents' submissions

23. They submitted that in consideration of the threshold of granting leave, Courts are guided by the decision in **Republic v Secretary of State Ex. P. Herbage [1978] 1 ALL ER 324** cited in **Hassan Noor Hassan v Director of Public Prosecutions & another [2016] eKLR** that leave should be granted if the material available shows there is an arguable case for granting leave.

24. He submitted that what amounts to an arguable case was held in **Mirugi Karikui v Attorney General [1992] eKLR**. They submitted that the Applicant has failed to meet the lowest threshold of a claim filed within this Court as provided under Section 12 of the Employment and Labour Relations Court Act.

25. They relied on the case of **Nick Githinji Ndichu v Clerk Kiambu County Assembly and another [2014] eKLR**, which held that for one to access the jurisdiction of the Court, he must demonstrate that there exists an employer-employee relationship. Additionally, that advertisement, shortlisting, interviewing are steps towards recruitment and creating the relationship but are not envisaged in Section 12 of the Act on jurisdiction of the Court.

26. They therefore submitted that this Court should down its tools and address itself on jurisdiction as there is no contract of service that is in question.

27. They submitted that it is true in principle that the Court can review appointments to public bodies to satisfy procedure and legality of the appointments. They relied on the decision in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**.

28. They argued that the appointment of the 2 members was well within the legal mandate and duty of the 1st and 2nd Respondents as envisioned in the first schedule of the County Assembly Services Act No. 24 of 2017.

29. They argued that due process was followed in all steps and all the steps enshrined in the Act which included advertisement, duration of the application, shortlisting and conducting of interviews and approval which happened on 19th February, 2020.

30. They submitted that the applicant has not produced any evidence of improper constitution of the Board other than allegations of a bar exercising official duties towards a member.

31. They further submitted that the applicant does not state that the meeting at which the decision was made was not lawfully constituted. They submitted that a similar decision was made in **Republic v Nairobi City County Assembly Service Board & another e parte Monica Muthami & 7 others [2019] eKLR**.

32. They submitted that the Applicant has failed the test of showing an arguable case thus the prayer for stay should fail. They submitted that should the Court find otherwise, it should be guided by the decision in **Taib A. Taib v Minister for Local Government and 3 Others [2006] eKLR** cited in **Easy Coach Limited & 2 Others v Insurance Regulatory Authority & 3 Others [2015] eKLR** that injunctions are not available against the government and public officers and that stay is a very important aspect of judicial review jurisdiction.

33. They submitted that in the event that the Court grants leave to the applicant, the same should not apply as a suspension of the decision of the 1st and 2nd Respondents. They further urged the Court to find that the facts in the case and public interest militate against the grant of the orders sought in the application.

34. I have considered the averments of the Parties herein. They are 2 issues for this Court's consideration as follows:-

- 1. Whether the application meets the threshold for Court to grant leave to seek Judicial Review.**
- 2. Whether leave if granted should operate as stay.**

35. In **Republic vs Secretary of State, Ex parte Herbage [1978] 1 ALL ER 324**, and quoted in **Hassan Noor Hassan vs Director of Public Prosecutions & Another (2016) eKLR** the Court stated as follows:-

“It cannot be denied that leave should be granted, if on the material available, the Court considers without going into the matter in depth, that there is an arguable case for granting leave”.

36. In interpreting what amounts to an arguable case, the Court in **Mirugi Kariuki vs Attorney General [1992] eKLR** and quoting Lord Scarman in **Inland Revenue Commissioners vs Naitonal Federation of Self-Employed and Small Business Limited [1981] ALL ER 93** determined that:-

“It is wrong in law, as I understand the case for the Court to attempt an assessment of the sufficiency of an Applicant’s interest without regard to the matter of his complaint. If he fails to show, the Court would be in error if it granted leave to apply, that he has a case, is an essential protection against abuse of busy bodies, cranks and other mischief makers. I do not see any other purpose served by the requirements for leave.”

37. In instant application the duty of this Court is to consider whether indeed there is an arguable case.

38. The main contention by the Applicant is that here was no County Assembly Service Board to conduct business at the time the board purported to conduct business and appoint the appointed individuals to the Board.

39. The main contention is lack of quorum to conduct its business and meaning that the outcome was accordingly flawed.

40. The Respondents on their part contend that they had due quorum and also rely on Section 8 of the Second Schedule of the Act which provides as follows:-

“The Board may act notwithstanding a vacancy in its membership or absence of a member and its proceedings shall not be invalidated by the presence or participation of a person not entitled to be present at or to participate in those proceedings”.

41. Indeed the law does not foresee a situation where the action of County Assembly Service Board (CASB) would be invalidated due membership on quorum flaw.

42. The main ground upon which the Applicant relies on to seek leave to institute Judicial Review proceedings is solely an issue of the quorum of Nairobi City County Assembly Service Board (NCCASB) in which they have averred that it had no quorum as at the time of conducting its business. Section 8 of the Second Schedule of the Act therefore vindicates the Respondent in this regard.

43. The Applicants also contend that the 1st Respondents set 7 days as the period within which applications were to be received whereas paragraph 2 of the First Schedule to the County Assembly Service Act 2017 sets a period of 14 days.

44. The Respondents raise a new arguable issue as to the meaning of within 14 days, which they aver requires interpretation. With this new angle, I believe the matter will definitely raise arguable issues, which can only be handled after the hearing of this Judicial Review. In the circumstances, I find that the application for leave to commence Judicial Review proceedings is valid and is allowed.

Stay

45. On issue of stay, having found that there are arguable issues, the next issue is whether the leave granted should operate as stay. I note that this application was filed way back in March 2020. The Hon. J. Radido in certifying the application did not grant any interim orders of stay.

46. The Respondents aver that since the appointment of the 2 impugned members to the board, they have continued to serve the County Assembly Board. They aver that the decision has fully been implemented with the 2 members of the board assuming their functions and giving services to the citizenry.

47. In view of this fact, there is an element of public interest militating against granting the prayers for stay at the moment. I will therefore exercise my discretion and not allow the leave to operate as stay.

48. The costs of this application will be in the Main application.

Dated and delivered in Chambers via zoom this 21st day of October, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Agria for 1st and 2nd Respondents – Present

Mwalimu for Applicants – Present