



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

JR NO. 37 OF 2017

REPUBLIC.....APPLICANT

VERSUS

PRIVATE SECURITY REGULATORY AUTHORITY.....1ST RESPONDENT

STATE CORPORATION ADVISORY COMMITTEE.....2ND RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF INTERIOR

AND COORDINATION OF NATIONAL GOVERNMENT.....3RD RESPONDENT

EX PARTE

CHARLES ARORI (CHIEF SHOPSTEWARD).....G4S

MESHACK KARAKACHA (CHIEF SHOPSTEWARD).....B.M SECURITY

GEORGE SIKUTA (CHIEF SHOPSTEWARD).....911

ENOCK SHITOSHE (CHIEF SHOPSTEWARD).....DEWAY

JANICE KAARA (CHIEF SHOPSTEWARD).....WELLFARGO

JAMES MUEMA (CHIEF SHOPSTEWARD).....SECUREX

EZEKIEL MUTOKO (CHIEF SHOPSTEWARD).....INTERSECURITY

ERICK JUMA (CHIEF SHOPSTEWARD).....KENYA KAZI

LIBERIOUS SIFUNA (CHIEF SHOPSTEWARD).....SECURITY GROUP AFRICA

BENARD INJENDI (CHIEF SHOPSTEWARD).....FARGO COURIER

AND

STEPHEN P. NGANGA

INTERESTED PARTY

JUDGMENT

Introduction

1. The Applicants filed a judicial Review application vide the Notice of Motion dated 19th December 2017, pursuant to section 8 and 9 of the Law Reform Act, Order 53 Rule 3 of the Civil Procedure Rules and all enabling provisions of the Law.

2. The Applicants seek the following orders:

- a. An order of certiorari to call into this court and quash the Kenya Gazette Notice No. 6868 issue of 21st July 2017, appointing Prof. Stephen P. Nganga as the Chairman of Private Security Regulatory Authority.
- b. Costs of this Application be provided for.

3. The Application is supported by the grounds as set out in the Statement of facts and the Verifying Affidavit of Charles Arori sworn on 18th December 2017. That by the Kenya Gazette Issue of 21st July 2017, Stephen P. Nganga was appointed as the chairperson of the Private Security Regulatory Authority.

The said appointment violates the provisions of section 11 (3)(c) of the Private Security Regulation Act which provides that a person shall be qualified to be appointed the Chairperson if that person:

- a. Is a citizen of Kenya.
- b. Meets the requirement of Chapter Six of the Constitution has served the public with distinction; and
- c. Has at least 15 years' experience in security matters.

4. The applicant further contended that the academic resume of Prof. Stephen Nganga does not show any indulgence in security related matters. That before Prof. Nganga was appointed, the President was advised by the 2nd and 3rd Respondents who also gave their input on the said appointment. That the appointment of professor Stephen Nganga who is an employee of the Jomo Kenyatta University of Agriculture and Technology, ignored the prohibition for appointment of state and public officers to the Boards of State Corporations.

5. Since the establishment of the 1st Respondent and the appointment of Prof Nganga in May 2017, a licensing policy is still yet to be formulated. This policy would have controlled employers who underpay their employees. That only a few private service providers pay the prescribed minimum wage while most of the firms have not provided the basic minimum working conditions due to the absence of regulations brought about by the ineffective leadership at the board.

6. The Applicants expected the underpayment and undercutting in the industry to be addressed for the benefit of the private security guards who are approximately 500,000.00 in number. However, the chairperson has failed to guide the Board towards realization of the goals set out in section 9 of the Private Security Regulation Act, Articles 40 and 41 of the Constitution.

7. The first respondent never opposed the Application but the 2nd and 3rd Respondents opposed the same vide their Grounds of Opposition dated 14th May 2018. In summary the respondents contended that the Application offends the mandatory provisions of Order 53 rule 2 of the Civil Procedure Rules, 2010; that it is a blatant abuse of the court process and should be struck out with costs; and that in the interest of justice the prayers sought should not be granted.

8. On 8th November 2018, the Court gave directions to have the instant Application disposed of by way of written submissions. Consequently, the Applicants filed their submissions on 21st November 2018 and thereafter the 2nd and 3rd Respondents filed their submissions on 26th November 2018.

The Applicant's Submissions

9. The Applicants submitted that the guidelines in resolving a judicial review application were set out in the case of *Rashid Odhiambo Allogoh & 245 Others Vs. Haco Industries [2015] eKLR* as follows:

- a. First, the Court should consider whether or not the allegations made by the appellants were true. If they are not true, the matter ends there.
- b. Secondly, the Court should consider whether the proved or admitted facts constitute or amount to a violation of the provisions of the Constitution. If they do not constitute a contravention of the constitutional provisions relied upon by the Appellants, the matter ends there. However, if they amount to a contravention then the court moves to the last stage to determine what remedies the Appellants are entitled to.

10. They further submitted that where a constitutional issue arises, the Petitioner should be allowed to prove the allegations of breach. That they have made several allegations of facts which are supported by evidence and which were not controverted including the allegation that Prof. Stephen P. Nganga has no experience in the security industry; that the appointment of Prof. Stephen P. Nganga as the chairperson of the Private Security Regulatory Authority contravenes **section 11 (3) (c) of the Private Security Regulation Act 2016** as he lacks 15 years of experience in security related matters; and that the appointment violates the Circular of 3rd February 2016 which bars appointment of state officers and public officers to boards of state corporations and more so Clause 9 of Chapter 1 of *Mwogozo* which requires that chairpersons of all state corporations shall at a minimum possess the qualifications, skills and experience.

11. The applicants further submitted that the Respondents have acted arbitrarily, unfairly and in bad faith against the principles of proportionality and legitimate expectation in the impugned appointment of the interested party. They relied on *Hon. George Saitoti vs. Judicial of Enquiry into the Goldenberg Affair [2006]eKLR*, where the court reflected on Lord Diplock's decision in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] AC 374 at page 408** where he observed as follows:

“It seems established that in certain cases where an Applicant has been promised that there will be for instance, consultation before a decision is made, then a legitimate expectation will arise that that consultation will take place and if it does not, then there will be a breach of the duty to act fairly.”

12. The Applicants submitted that they legitimately expected that the law and the positions as stated in the Circular and Mwongozo Code would be followed in appointing the Chairperson of the 1st respondent but it was not.

13. On the issue of proportionality, the applicants submitted that the Respondents did not weigh the adverse effects that their actions would have on the interests the Applicants and their co-employees in the private security industry at large. That the respondents failed to strike a fair balance between the adverse effects of their decision would have on the Applicants’ rights to prescribed minimum working conditions, which have been denied by most employers.

14. The applicants further submitted that due to Prof. Nganga’s limited experience, he has been unable to create initiatives that were expected of the Authority to address the ills affecting the private security industry. That if section 9 of the Act were implemented, the issue of underpayment of guards would have been addressed thereby leveling the playing field in the private security industry. That the guards legitimately expected that if the mechanism under sections 28, 29 (d) and 30 of the Private Security Regulation Act were implemented, rogue employers would be deterred thus eliminating the menace.

15. It is further Applicants’ submissions that the absence of an evidential foundation for the appointment and decisions made, constitutes an error of law. That the Respondents frustrated the statutory purpose of appointing Prof. Nganga and thus acted illegally. That the Respondents’ aforesaid actions are illegal and in breach of the fundamental rights of the Applicants as it undermines or is likely to undermine realization of the fundamental right of the Applicants to fair labour practices in Article 41. In conclusion, they submitted that they had established sufficient grounds to warrant the quashing of the Respondents’ decision as prayed.

The Respondents’ Submissions

16. The Respondents submitted that the application herein is incompetent for being filed out of time. That the Applicants were granted leave to file application for judicial review on 18th December 2018. That the substantive motion ought to have been filed within 21 days of the said leave but it was filed 72 days thereafter. That in addition the Application was filed on 2nd March 2018, 7 months after the impugned Gazette Notice was published on 21st July 2017, contrary to Order 53 rule 2 which requires in mandatory terms that the Application be brought within 6 months or less.

17. They further submitted that judicial review proceedings are special proceedings which are neither civil or criminal in nature and as such the provisions of the Civil Procedure Act and Rules do not apply. That, **Article 159 (2) (d) of the Constitution 2010** cannot aid the Applicants, as the issue of whether this Court has can enlarge time within which the substantive motion ought to have been filed, is not a procedural technicality as it goes to the substance and jurisdiction of the court.

18. The Respondents further submitted that sections **8 and 9 of the Law Reform Act, Cap 26** and **Order 53 of the Civil Procedure Rules** do not provide for the extension of time beyond the stipulated 21 days. They rely on **Commissioner for Lands & Kunste Hotel Limited [1997] eKLR** where the Court of Appeal held that judicial review proceedings are neither civil or criminal in nature hence not a suit as defined under section 2 of the Civil Procedure Act. They also rely on **M.M. Ole Keiuwa & Another vs. Yash Pal Ghai [2002] eKLR** where the Court emphasized that the proceedings under Order 53 of the Civil Procedure Rules are special in nature, thus Order 53 stands alone exclusive of other provisions of the Civil Procedure Rules and Act, and that section 3 of the Act fortifies this position by recognizing special jurisdiction or procedure prescribed by or under any law for the time being in force.

19. The Respondents concluded by submitting that the instant Application is an abuse of the Court process and ought to be struck out with costs.

The Analysis

20. After carefully considering the Motion, Statement of facts, Affidavits evidence and the submissions presented by both parties, there is no dispute that Prof Nganga was indeed appointed Chairperson of the Private Security Regulation Authority on 21.7.2017 vide Gazette Notice No. 6868. The issues for determination are summarized as follows:

- a) Whether the substantive motion is competently before this Court.
- b) Whether the Applicants have established sufficient grounds to warrant this Court to grant the Orders Judicial review sought.

Whether the Application is incompetent.

21. The respondent contended that the application is incompetent because first, the substantive motion was filed more than 21 days after the grant of leave to file the same, and secondly, the application was filed more than 6 months after the impugned gazette notice was made.

22. **Order 53, rule 1 of the Civil Procedure Rules** provides that no application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule. Under order 53 rule 2, an application for an order of certiorari shall be made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act.

23. In this case, Leave was granted to the Applicants on 12th February 2018 to file their substantive Application within 21 days. The Applicants filed their substantive Application on 5th March 2018. My simple calculation shows that the motion was filed within the 21 days

provided by the law.

24. As regards the alleged delay in filing the substantive motion after the impugned gazette notice, the Respondents contended that the Application was filed 7 months after the Gazette Notice was published contrary to provisions of Order 53 rule 2, which according to them, requires that the application must be filed within 6 months or less. The said rule provides as follows:

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act.”

25. I have carefully considered the submissions by the respondents on the alleged delay in filing the motion and found the same to be unfounded and misconceived. With due respect, the six months limitation period in the said rule does not relate to the substantive motion but rather the application for leave which is by Chamber Summons. In my view, once the application for leave is filed within six months from the date when the impugned decision or act or omission was made, the substantive motion cannot become incompetent unless filed after the lapse of 21 days from the date when the leave is granted or such shorter period as the court may direct.

26. The Gazette Notice which the Applicants want quashed was published on 21.7.2017 and the application for leave was timeously filed on 18.12.2017. Leave was granted on 12.2.2018 and the main motion was filed on 5.3.2018. Consequently, I give the application for leave and the substantive motion a clean bill of health and reject the objection by the respondents that they were filed out of time.

(b) Whether there are grounds for granting the order of certiorari

27. The applicants prayed for an order of certiorari to call into this court and quash the Kenya Gazette Notice No. 6868 issue of 21st July 2017, appointing Prof. Stephen P. Nganga as the Chairman of Private Security Regulatory Authority. The grounds pleaded for the said reliefs, in my view, can be collapsed into two, that is to say;

(a) that the interested party lacks the necessary qualifications for the job, and

(b) he is also disqualified for the job because he is serving public officer.

28. The applicants contended that the said appointment was illegal because it violates the provisions of section 11 (3) (c) of the Private Security Regulation Act which provides that a person shall be qualified to be appointed the Chairperson if among other things, the person has at least 15 years' experience in security matters. They further contended that the appointment also violates Clause 9 of Chapter 1 of *Mwongozo* Code of Governance which requires that chairpersons of all State Corporations shall at a minimum possess the required qualifications, skills and experience. In addition to the lack of minimum qualification, the applicants contended that the appointment violates Circular of 3rd February 2016 which bars appointment of state officers and public officers to boards of State Corporations.

29. The interested party never disputed the foregoing grounds upon which the application is brought. Likewise, the 2nd and 3rd respondent's never controverted the said grounds and instead dwelt on the issue of form and made no effort to respond to the substance of the case.

30. I have carefully considered the material presented to the court by the parties through their pleadings, affidavits and submissions. There is no doubt that based on the copy of the interested party's profile annexed as CA-2 to the applicants' Verifying Affidavit, the interested party is an Engineer who has specialized in Applied Mechanics, Metallurgy and Material Engineering. Nothing in the said profile suggests that he has any training or experience in security issues. He is therefore clueless in security issues and lacks the minimum qualification of having 15 years' experience in security related matters.

31. In addition to the foregoing, I have also verified from the Addendum to the *Mwongozo* Code of Governance annexed as CA-7 to the applicants' Verifying Affidavit, that for a person to be appointed as Chairperson of a Board of State Corporation, he/she must, among other qualifications, hold a degree in the relevant field from a University recognized in Kenya. As already observed herein above the interested party is seasoned Engineer in Applied Mechanics, Metallurgy and Material Engineering but clueless in security matters. Consequently, I return that the interested party one Professor Stephen P. Nganga is not qualified for appointment to the position of Chairperson of the 1st respondent under section 11 (3) (c) of the Private Security Regulation Act.

32. He is also disqualified from serving as the chairperson of the Board by dint of the policy guidelines published vide Circular dated 3rd February 2016 which barred the appointment of State Officers and Public officers to the Boards of State Corporations. The circular stated that :

“In view of the foregoing and in order to comply with the requirement of the rule of law under Article 10(2)(a) of the constitution, it has been decided that there shall be no more appointments of State Officers and Public Officers to the Boards of state Corporations on their individual capacities. Except where the legal instrument establishing a state corporation provides otherwise.”

33. As earlier observed, neither the interested party nor the respondents tendered any evidence to dispute the contention that the interested party is a public officer serving as a full time employee of the Jomo Kenyatta University of Agriculture and Technology. Consequently, I return that he is barred from any appointment to serve as a Chairperson of a State Corporation by dint of the said policy Guidelines published by the Circular dated 3.2.2016 which is anchored on the Constitution, and the Leadership and Integrity Act cap 182, Laws of Kenya.

34. In view of the foregoing analysis, it is obvious that the applicants have demonstrated that there exist good grounds for granting the reliefs sought including contravention of the express provisions of section 11(3) (c) of the Private Security Regulatory Authority Act on the one

hand, and contravention of the policy Guidelines published by the Circular dated 3.2.2016 which is anchored on the Constitution, and the Leadership and Integrity Act cap 182, Laws of Kenya , on the other hand.

35. The said contraventions according to the applicants are unreasonable, arbitrary and in bad faith and have the effect of infringing their fundamental rights to fair labour practices as envisaged under Article 41 of the Constitution, and their legitimate expectation that better terms and conditions of service in the private security sector will achieved is going to be stifled by the appointment of clueless leadership of the interested party. This court, fully agrees with the said fears, contentions and submissions by the applicants and proceeds to grant the order of certiorari as prayed.

Conclusion and disposition

36. I have found that the application herein is competently before the court because both the Chamber Summons seeking leave to apply for the Certiorari and the instant motion were both filed within the statutory time lines. I have further found that the applicants have proved sufficient grounds for the grant of the reliefs sought. Consequently, I enter judgment in favour of the applicants by granting the order of certiorari as prayed in the Notice of Motion dated 2.3.2018 by bringing into this court and quashing the Kenya Gazette Notice No. 6868 issue on 21.7.2017 which appointed Prof. Stephen P. Nganga as the Chairperson of the Private Security Regulatory Authority. The applicants are also granted costs of the suit.

Dated, Signed and Delivered in Open Court at Nairobi this 26th day of April, 2019

ONESMUS N. MAKAU

JUDGE