



**Dwasi v Cabinet Secretary for Environment and Natural Resources;  
Judicial Service Commission (Interested Party) (Judicial Review  
35 of 2017) [2018] KEELRC 2275 (KLR) (2 March 2018) (Ruling)**

*Jane Akinyi Dwasi v Cabinet Secretary for Environment and Natural Resources & another [2018] eKLR*

Neutral citation: [2018] KEELRC 2275 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
JUDICIAL REVIEW 35 OF 2017  
NJ ABUODHA, J  
MARCH 2, 2018**

**BETWEEN**

**DR. JANE AKINYI DWASI ..... CLAIMANT**

**AND**

**CABINET SECRETARY FOR ENVIRONMENT AND NATURAL  
RESOURCES ..... RESPONDENT**

**AND**

**JUDICIAL SERVICE COMMISSION ..... INTERESTED PARTY**

**RULING**

1. By a Notice of Motion filed on 23<sup>rd</sup> January, 2018 the respondent sought orders among others that:
  - a. That pending the inter parties hearing and determination of this application, the ex parte order No. 3 that is the order reinstating the applicant/respondent as the Chairperson of the National environment Tribunal pending the hearing and determination of her application inter parties issued by Honourable Justice Abuodha on 11<sup>th</sup> day of December, 2017 be set aside, discharged and/or varied.
  - b. That pending the inter parties hearing and determination of this application, this honourable court be pleased to issue an order prohibiting, restraining and/or preventing the applicant/respondent herein from assuming, occupying and/or discharging any of the functions and/or duties of the office of the chairperson or the National Environment Tribunal.
  - c. That the honourable court be pleased to set aside, discharge and/or vary the ex parte order No 3 (that is the order granted to the applicant/respondent herein reinstating her as the



chairperson of the National Environment Tribunal pending the hearing and determination of her application inter parties issued by Honourable Justice Abuodha on 11<sup>th</sup> day of December, 2017) pending hearing and determination of the substantive judicial review proceedings herein.

2. The application was brought on the grounds inter alia that the orders were obtained through flagrant misrepresentation, deliberate concealment and material non-disclosure on the part of the applicant/respondent herein. Further that upon expiry of the term, the position of the chairperson to Tribunal fell vacant and could only be filled as per the provisions of section 125(2); 7 & 8 of the *Environmental management and Co-ordination Act*. The filling of the vacancy entailed nomination by the Judicial Service Commission, for appointment and gazette by name by the Cabinet Secretary for the Ministry of Environment and natural Resources.
3. The application was further supported by the affidavit of Prof. Judi Wakhungu, the then CS Ministry of Environment and Natural Resources who deponed on the main that:
  - a. That I have after consultations within my Ministry and the Government legal advisor formed an opinion that the orders granted ex-parte on 11<sup>th</sup> December, 2017 ought to be set aside for the reasons set out below.
  - b. That the substance of the suit herein involves the respondent/applicant wish to be reappointed as the chairperson to the National Environment Tribunal.
  - c. That I am aware the applicant/respondent vide application dated 1<sup>st</sup> December, 2017 sought to leave to commence judicial review proceedings for an order of mandamus against my office.
  - d. That on 11<sup>th</sup> December, 2017 the honourable Justice Abuodha upon hearing the application ex-parte granted leave to commence judicial review proceedings and further issued an Order No 3 in effect reinstating the applicant/respondent herein as chairperson of the National Environment Tribunal.
  - e. That the said ex parte order No 3 reinstating the applicant/respondent as the chairperson of the National Environment Tribunal was obtained through flagrant misrepresentation, deliberate concealment and non-disclosure of material particulars on the part of the applicant/respondent herein as the same ought to be set aside.
  - f. That my office had, be gazette notice appointed the applicant/respondent as chairperson of the National environment tribunal for a period of three (3) years which term expired on 17<sup>th</sup> Jul, 2017.
  - g. That upon the expiry of the tem, the position of the chairperson to the Tribunal fell vacant and could only be filled as per the provision of section 125(2), (7) & (8) of the *Environmental Management and Co-ordination Act*.
  - h. That the filling of the vacancy entails nomination by the Judicial Service Commission and, appointment and gazette by the cabinet secretary for the Ministry of Environment and Natural Resources which office I occupy.
  - i. That it is only upon appointment and gazette by the cabinet secretary that a nominee of the Judicial Service Commission or any member of the tribunal can assume the office of the chairperson or member of the National Environment Tribunal.
  - j. That contrary to the well-laid down legal process, the applicant/respondent armed with the ex parte order citing the impugned order number 3 has purported to reinstate and install herself as



chairperson of the National Environment Tribunal and has proceeded, assumed and continues to occupy and discharge the functions and/or duties of the office of the chairperson of the national environment tribunal including conducting hearings at the National environment Tribunal.

- k. That the impugned ex-parte orders No 3 have usurped the power and mandate of my office whereby the reinstatement, in the absence of a valid appointment and gazette, the applicant/respondent's occupation of office is a nullity. This is particularly true since as the former chair the applicant/respondent vacated her office in July 2017 when her term expired and there has been a gap of almost 6 months before her purported reinstatement which factor the court did not take into consideration or possibly the said fact was not brought to the court's attention.
- l. That upon expiry of her term as the chair, the applicant/respondent's term or tenure of office ended, she has not been appointed or reappointed through a gazette notice as stipulated by the law under section 125 of *EMCA* it therefore follows that since there was a break in service she cannot be reinstated as the impugned order purports to do.
- m. That it is true that before the expiry of the applicant/respondent's term of service, she did write to the Judicial Service Commission and sought renewal of her tenure to enable her complete pending appeals.
- n. That as it is the practice the Ministry wrote to the Judicial Service Commission requesting for recruitment of a new chairperson as the term of the applicant/respondent had expired.
- o. That vide a letter dated 13<sup>th</sup> October, 2017, the Ministry of Environment and Natural Resources wrote to the Judicial Service Commission and expressed their dissatisfaction with the performance of Dr Jane Dwasi and brought to its attention several other complaints from members of the tribunal and advised the Judicial Service Commission that in the circumstance she was not suitable for reappointment and recommended to the Commission to consider nominating a suitable candidate through a competitive process.
- p. That besides there were other complaints from the members of the tribunal against the performance and conduct of Dr Jane Dwasi which were made available to the Judicial Service Commission for consideration before her nomination which complaints have been exhibited by the applicant/respondent in her affidavit before this court dated 1<sup>st</sup> December, 2017 marked exhibit JAD 9. These complaints have raised serious questions on her competence and ability to chair the tribunal and harmoniously discharge her duties with other members of the tribunal.
- q. That the said complaint shows a dysfunctional and deadlocked tribunal under her watch which is riven with disagreements, a situation which the parent Ministry cannot countenance as this led to a massive backlog of cases at the tribunal.
- r. That based on the complaints the members of the tribunal had availed to the Ministry and also to the JSC, the Ministry's assessment as the appointing authority was that she was unsuitable to continue serving as the chair of the tribunal and that the JSC should nominate a fresh candidate.
- s. That the JSC went ahead and nominated Dr Jane Dwasi as the chair of the tribunal despite several complaints from members.
- t. That the rationale for the Judicial Service Commission proposal for a one year extension is that it would allow the former chairperson to wind up pending matters was unfounded as there



is no guarantee that those matters would be concluded within that time frame owing to the protracted nature of proceedings before the tribunal and further it will cause injustice to the new matters that are likely to be filed in addition the said decision was in bad faith as it flies in the face of the Ministry objections as it is the JSC itself which has in the first place had written to the ministry seeking the ministry's opinion on the suitability of the intended nominee.

- u. That after the name of the nominee was forwarded for appointment, my ministry wrote vide letter dated 13<sup>th</sup> October, 2017 to the Judicial Service to reconsider the candidature of the applicant/respondent and my office is awaiting further communication from the Judicial Service Commission.
  - v. That notwithstanding the foregoing, I am advised by the learned counsel on record that whereas the function of Judicial Service Commission to nominate, the power to appoint and gazette vests with the Cabinet Secretary for Environment and Natural Resources. The appointment only takes effect upon gazettment of the nominee as provided for under section 125(2).
  - w. That in the absence of appointment and gazettment of the chair by the Minister, then the court cannot purport to reinstate her as doing so is tantamount to usurping the role of the Minister as the appointing authority.
  - x. That the action by Judicial Service Commission to nominate the applicant/respondent for a period of one year is also in breach of section 125 of *EMCA* which creates a three (3) year term for all members of the tribunal including the chairperson and as the appointment authority the Ministry wrote to Judicial Service Commission and reiterated that under section 125(2) a chairperson of the National environment Tribunal should be appointed for a period of 3 years.
4. In her submissions in support of the application Ms Mbitio stated that the application dated 1<sup>st</sup> December, 2017 was under judicial review seeking leave to commence proceedings for judicial review orders. In the same application, the applicant sought reinstatement. The court granted leave and an order for reinstatement. According to counsel however, under Order 53(4) it's only for prohibition and certiorari that leave can operate as stay. Counsel contended that a stay order cannot be made for an order of mandamus. Counsel further submitted that an order of reinstatement was granted without hearing all the parties. Ms Mbilo therefore submitted that her client was aggrieved by the order since the respondent was the one to appoint and gazette the chair of the Tribunal and the nominee came from Judicial Service Commission (JSC).
5. Counsel further submitted that the JSC had advertised for the position of the Chair of NEMA Tribunal and the applications were closing on 26<sup>th</sup> February, 2018 which meant the position was vacant. Ms Mbilo further submitted that the Tribunal was supposed to operate with members from various institutions hence if the applicant continues to sit before the official appointment, public interest would be injured if she was ultimately found to have been improperly reinstated.
6. Mr Ogutu for the respondent/applicant submitted that the JSC decided to appoint the applicant for a further one year hence the office was not vacant. Counsel further submitted that under Rule 7(3) of *ELRC Rules* a party is at liberty to seek enforcement of constitutional rights and the court has power to issue any other order apart from judicial review orders. According to counsel, the applicant relied on constitutional provisions as well and these provisions allow grant of additional orders. Further, rule 28 of the *ELRC Rules* allow the court to issue orders beyond judicial review orders. Counsel therefore submitted that in issuing the orders, the court was convinced there was violation or threatened violation of constitutional rights.



7. Mr Malanya for the Interested Party associated himself with Mr Ogutu's submissions and stated that grant of leave and any injunctive order was a matter of judicial discretion. The court could not therefore be faulted if acted judiciously. According to counsel the scope of judicial review applications had been expanded under the new constitution.
8. According to counsel, the JSC nominates the Chairperson and it sat and become of the view that the Chairperson be reappointed since the activities at the Tribunal had stalled. Counsel further submitted that the JSC was an independent commission and it was not for the respondent to determine for it which nominee to pick. According to counsel, setting aside is a restricted jurisdiction which should be exercised in clear cases. Further setting aside could be done in case of material non disclosure and or misrepresentation. The respondent did not demonstrate any of these.
9. Concerning reinstatement counsel submitted that the purpose of interim orders was to preserve the substance of the suit and could be ordered if after balancing all interests it was the just order to make. Counsel therefore submitted that by the time the applicants term lapsed, the vice chair had not been appointed hence if the JSC did not make the recommendation the activities of the Tribunal would collapse. Ms Mbilo in rejoinder submitted that the application was not brought under the constitution. It ought then to have been a constitutional petition seeking judicial review orders.
10. The Chairperson National Environment Tribunal hereinafter referred to as "chair NET", sought extension of her contract on 10<sup>th</sup> April, 2017 from the JSC. This was three months prior to the expiry of her contract. On 5<sup>th</sup> September the respondent wrote to the JSC to recruit a new person to take up the chair of the NET following the retirement of the holder Mrs Jane Dwasi whose membership had expired. This letter was written almost one and half months after the expiry of the 3 year term of the chairperson of the NET.
11. On 14<sup>th</sup> September, 2017 the JSC wrote to the chairperson NET informing her of the recommendations by the JSC for renewal of her contract for another 1 year to enable her fast track and finalize on part heard matters among other cases. This letter was written almost 2 months after the expiry of the chairperson NET's contract and almost five months after request for extension to JSC by the chairperson NET.
12. This recommendation seems to have been rejected by the respondent and it proposed that the JSC nominates a new candidate. The rejection triggered a lengthy and a terse letter from JSC in which it stated its position in the matter and role in appointment of the chairperson NET. This letter elicited a response from the respondent in which it said recent correspondence by members of the tribunal to the CS's office and JSC showed that the chairperson NET's performance and conduct was not satisfactory. This in the opinion of the CS ought to have been of paramount consideration to JSC before any extension.
13. The court deduces two things from the foregoing. First bureaucratic delay in handling succession at the National Environment Tribunal and power games between the respondent and the interested party.
14. The chairperson NET acted diligently in requesting for extension of her term to enable her complete certain tasks as outlined in her letter of request dated 10<sup>th</sup> April, 2017. The JSC responded to the request on 14<sup>th</sup> September 2017 almost two months after the end of term of the chairperson NET. The respondent on its part requested JSC to nominate a new person to replace the chairperson on 5<sup>th</sup> September, 2017 some one and a half months after the expiry of the incumbent's appointment.
15. The court did not see any correspondence exchanged between the respondent and the interested party as inter-agency courtesy would demand, on the matter. The interested communicated to the



- chairperson NET the decision to recommend for extension for one year of her appointment but nothing in the letter shows it was copied to the respondent for comments.
16. The respondent on the other hand in her letter of 13<sup>th</sup> October, 2017 in reaction to the JSC's terse letter of 5<sup>th</sup> October, 2017 makes reference to correspondence received by it and JSC concerning the chairperson conduct and performance which the respondent deemed unsatisfactory yet there is no evidence that these issues were ever raised earlier with JSC and further the court wonders why they were not raised or alluded to by the respondent in their letter of 25<sup>th</sup> September, 2017 when they advised JSC to nominate a new person instead of the incumbent.
  17. The National Environment Tribunal is a very important tribunal in our environmental governance. It would therefore be irresponsible for the court to sit back and watch helplessly as power games take stage between the respondent and the interested party. This is a court of law and exercising in exercising its powers it must do so in accordance with the law and the constitution.
  18. Under article 159, the judicial authority is derived from the people and vests in the courts and tribunals established by or under the constitution. In exercising the authority the court shall ensure among other things that justice shall not be delayed, justice shall be administered without undue regard to procedural technicalities and in a way that promotes the purposes and principles of the constitution.
  19. The people of Kenya desired and got the National Environment Tribunal established to handle environmental disputes. It would therefore not be in Kenyan public interest to allow power games and bureaucratic delays observed above to deprive them of access to the tribunal.
  20. Whilst section 125(4) (a) provides that all appointments to NET shall become vacant for among reasons, at the expiry of three years from the date of appointment, the Act is silent on what happens if no replacement is made immediately upon the expiry of the appointees term and the Act is silent on request for extension by an appointee as is the case here.
  21. In view of the fact that the interested party albeit late, had expressed the intention to recommend the extension of the chairperson's NET contract, and in view of the powers conferred on the court by article 159 of the *Constitution* and what I have said above, the only order that commends itself to me in determining the respondent's application dated 22<sup>nd</sup> January, 2018, is to countermand the interested party's letter dated 14<sup>th</sup> September, 2017 and exercising the powers conferred upon me by article 159 of the constitution order that Dr Jane Akinyi Dwasi shall in the interest of the public to use the services of National Environment Tribunal remain in office in transitory capacity pending the recruitment of her successor or hearing and determination of the Judicial Review application herein whichever is earlier.
  22. Parties are hereby directed to prepare and make ready for hearing the Judicial Review application within 60 days from the date of this ruling. Matter set for mention on 2<sup>nd</sup> May, 2018 for further directions on hearing and disposal.
  23. It is so ordered.

**DATED AT NAIROBI THIS 2<sup>ND</sup> DAY OF MARCH 2018**

**ABUODHA J. N.**

**JUDGE**

**DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF MARCH 2018**

**ABUODHA J. N.**

**JUDGE**



In the presence of:-

.....for the Claimant

.....for the Respondent

