



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

JR. NO. 01 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

BOARD OF DIRECTORS SIBO WATER AND

SANITATION COMPANY LIMITED.....APPLICANT

Versus

COUNTY GOVERNMENT OF SIAYARESPONDENT

AND

LAKE VISTORIA SOUTH WATER

SERVICES BOARD1ST INTERESTED PARTY

WATER SERVICES REGULATORY BOARD.....2ND INTERESTED PARTY

R U L I N G

On 2nd February 2017, I granted the applicant leave to file Judicial Review application which leave was to operate as a stay and stated that I would give my reasons thereof today.

The applicant had through chamber summons dated 26th January, 2017 sought the following orders -

1. This application be certified urgent and heard *ex-parte* in the first instance.
2. **THE BOARD OF DIRECTORS SIBO WATER AND SANITATION COMPANY LIMITED**, the applicant herein be granted leave to apply for **AN ORDER OF CERTIORARI** calling into this court for purposes of being quashed the resolution passed by the Respondent on 20th January 2017 dismissing the Applicants from employment as directors of Sibbo Water and Sanitation Company Limited.
3. **THE BOARD OF DIRECTORS SIBO WATER AND SANITATION COMPANY LIMITED**, the applicant herein be granted leave to apply for **AN ORDER OF PROHIBITION** restraining the Respondent its employees, officers, agents, representatives or any other persons acting through them from intimidating, harassing or in any other way interfering with the Applicant's mandate as directors at Sibbo Water and Sanitation Company Limited.
4. Leave so granted do operate as stay of the resolution passed by the Respondent on 20th January, 2017.

5. Costs of this Application be provided for.

I certified to application urgent on 31/1/2017 and directed the applicant to serve the Respondent and the interested parties and fixed the application for interpartes hearing on 2nd February, 2017 when I granted the applicant leave after hearing submissions from both parties.

The Respondent filed grounds of opposition to the application on 1st February, 2017 to wit

1. **THAT** the Application for leave to institute judicial review proceeding is founded on the wrong provisions of the law.
2. **THAT** the Application and the entire proceedings are brought in violation of the provisions of the Civil Procedure Rules on judicial review proceedings and Sections 8 and 9 of the Law Reforms Act.
3. **THAT** this Application offends the provisions of the Civil Procedure Act and the Rules thereunder.

Submissions for Applicant

Mr. Owiti for the applicant submitted that procedure was not followed in constituting the meeting that purported to dismiss the applicants, that the notice was signed by the County Secretary purporting to exercise the right of shareholders under section 279(4) of the Companies Act which gives shareholders right to call a meeting if directors fail to do so. The section requires such meetings to be called by shareholders as nearly as practicable to a notice given by the directors. He submitted that the relevant notice is 21 days but the notice given by the purported shareholders herein was 3 days, that 3 days is too short a notice.

Mr. Owiti further submitted that the directors were denied a right of hearing before they were removed in violation of Article 47 of the Constitution, that all the directors did not attend the meeting and therefore were not heard. That since the directors were still in office it is the directors that should have called the meeting. He submitted that the Directors had called a meeting for 27th January 2017 and there were no grounds for the shareholders to meet and hold the meeting of 20th January, 2017.

Mr. Owiti submitted that the shareholders acted outside their powers both substantively and procedurally.

He submitted that the application has been filed under Article 23 of the Constitution which provides for reliefs including judicial review. That section 10 of the Fair Administrative Action Act states that procedure will not be a ground to object to an application and called for disregarding of procedural technicalities.

Submissions for the Respondent

Mr. Otieno Willis on behalf of the Respondent submitted that the Respondent opposed the application and specifically for the leave to operate as a stay.

Mr. Otieno submitted that new board members have been appointed to replace the applicants, that the orders sought will adversely affect the new board members who have not been made parties to this suit and therefore have not been heard, that the applicants cannot approbate and reprobate at the same time.

He further submitted that having been removed from office and replaced by a new board the applicants should have filed the application in their individual names and not as a board.

Mr. Otieno further submitted that judicial review proceedings is a central control mechanism by which the judiciary exercises control over public bodies, that SIBO Water and Sanitation Company Limited is a private limited company and the impugned meeting was called by shareholders and therefore cannot be

challenged by judicial review proceedings as the decision does not constitute the exercise of a public mandate. He submitted that the issue the applicant seeks to litigate is a private law dispute best approached by instituting an ordinary suit. He referred the court to **Nairobi Civil Appeal No.45 of 2015 (no copy was provided) and names of parties were not stated**).

On the issue of technicalities Mr. Otieno submitted that Articles 22 and 23 of the Constitution and section 10 of the Fair Administrative Actions Act have not overthrown the requirement to state the provisions under which the court's jurisdiction has been invoked.

Determination

The issues for determination are whether the applicant is entitled to leave and if the leave should operate as a stay.

The circumstances under which the court may grant leave to a party to file judicial review proceedings have been considered in several cases and can be summarised as follows -

First, the court ought to ensure that the application is not frivolous, vexatious or hopeless. Secondly the court ought to be satisfied that there is a case fit for further consideration. Thirdly leave may only be granted if on the material before the court, without going into the matter in depth, there is an arguable case, the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. The granting of leave is an exercise of the court's discretion but must be exercised judiciously. (See **Republic v County Council of Kwale & Another Ex parte Kondo & 57 others Mombasa HCMCA No.384 of 1996**).

In Re Bivac International SA (Bureau Veritas) [2005] 2 EA (HCK), the court stated -

"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to 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. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judiciously."

In the present case it is the applicant's contention that the Respondent acted without authority and without compliance with statutory provision for calling a meeting of shareholders. It is further the applicant's contention that it was not given a hearing before adverse orders were made against it.

Based on these grounds, the applicant has established a prima facie case that warrants further investigation. The applicant has established that the application is not frivolous, or vexatious or hopeless.

On the issue of whether or not the leave should operate as a stay, the court considered the preservation of the subject matter and the fact that should the stay not be granted the circumstances are likely to change so much so that the judicial review remedies sought would be rendered nugatory and the judicial review application would be rendered a mere academic exercise.

The Respondent has objected to the application on grounds that it is a private limited company and that judicial review is not available herein where the Respondent is exercising a private right as a shareholder.

The question therefore is whether the Respondent is a private entity and whether it was exercising private rights in calling the meeting and disbanding its board of directors.

The letter removing the Board of Directors is on a letterhead of "**The Republic of Kenya, County Government of Siaya**. It is from the **Ministry of Water, Irrigation, Energy and Natural Resources**. It is signed by the **County Executive Committee Member - Water, Irrigation, Energy & Natural Resources in that capacity**. The letter is copied to the **Governor, the County Secretary, Legal Advisor and Company Secretary (SIBO)**.

The person who signed the notice is the County Secretary, County Government of Siaya. There is no evidence that there was any shareholder other than the County Government of Siaya.

Under Article 1(3)(b) of the Constitution County Governments are state organs exercising sovereign delegated powers of the people of Kenya and are not private organisations. The argument of counsel for the Respondent that the subject of this suit is in the private realm and not liable to judicial review is therefore not a valid argument. I have also looked at the shareholding of the Respondent SIBO Water and Sanitation Company Limited and it is all by the former councils which are now covered by the County Government of Siaya. They include -

- Siaya Municipal Council represented by Mayor
- Siaya County Council represented by Chairman
- Bondo Town Council represented by Chairman
- Ugunja Town Council represented by Chairman
- Bondo County Council represented by Chairman
- Ukwala Town Council represented by Chairman
- Yala Town Council represented by Chairman

Under the Fourth schedule of the Constitution Water Services which is what the Respondent provides is part of the functions of County Governments. As stated under its objects, the Respondent was established to carry on business of a Water Service Provider, as defined by the Water Act 2002.

The foregoing is the basis upon which this court granted leave to the applicant to file judicial review proceedings and for the leave to operate as a stay.

Dated, Signed and Delivered this 9th day of February, 2017

MAUREEN ONYANGO

JUDGE