



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**PET 95 OF 2016**

**OKIYA OMTATAH OKOITI.....PETITIONER**

**VERSUS**

**THE PRESIDENT OF KENYA.....1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY INTERIOR.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**STATE CORPORATIONS ADVISORY COMMITTEE.....4<sup>TH</sup> RESPONDENT**

**AND**

**BETTING CONTROL AND LICENSING BOARD.....1<sup>ST</sup> INTERESTED PARTY**

**FRANCIS KIPKURUI SANG.....2<sup>ND</sup> INTERESTED PARTY**

**ANTHONY KIMANI KUNG’U.....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

1. The petitioner moved an application dated 27<sup>th</sup> June 2016 seeking for an order that;

*That pending the hearing and determination of the Application herein, this honourable Court be pleased to issue a temporary order of prohibition suspending the implementation of Gazette Notice No 4633 of June 23<sup>rd</sup> 2016 wherein the 1<sup>st</sup> Respondent purports to appoint the 2<sup>nd</sup> Interested party as the Chairperson of the 1<sup>st</sup> Interested party while simultaneously revoking the appointment of the 3<sup>rd</sup> Interested party.*

2. The court granted interim orders in terms thereof and set the matter for *inter-partes* hearing upon filing of a response by the respondents and interested parties.

4. Instead of responding to the application, the respondents represented by the Hon. Attorney General filed a fresh application under a certificate of urgency on 5<sup>th</sup> August 2010 seeking *inter alia*;

*“That this honourable court be pleased to set aside that order of Justice Nduma issued on the 3<sup>rd</sup> August 2016 pending the hearing and determination of this application”.*

4. From the outset, the court notes that this practice of bringing a counter application instead of filing a response to the initial application has gained notoriety and in the court's view it is a practice that is not desirable in that;

i. It causes delay in disposal of applications brought on a certificate of urgency in that the court is forced to hear and determine two separate applications on the same subject matter instead of one application.

ii. Confuse the issues and procedure to be followed in disposing the two applications because the opposing parties are forced to each file a replying affidavit to the respective applications.

5. In the courts view, this practice needs to be discouraged as it is inimical to proper and expedient administration of justice. Meanwhile, the respondents sought to defeat the substratum of the initial application by having the cabinet secretary interior (2<sup>nd</sup> respondent) revoke the Gazette Notice No 4633 of June 2016 issued by the President of the Republic of Kenya in terms of which the 2<sup>nd</sup> interested party was appointed as the Chairman of the 1<sup>st</sup> interested party, Betting Control and Licensing Board for a period of 3 years and substitute the same with an appointment of the 2<sup>nd</sup> Interested party by the cabinet secretary Ministry of Interior vide special gazette Notice No 5356 of 2016 which purports to revoke and substitute the initial appointment by the president.

6. The Hon Attorney General urged the court to therefore set aside the interim orders since the subject matter was now spent due to the aforesaid intervention by the cabinet secretary Ministry of Interior. In reaction to the new development the petitioner moved court to grant leave to amend the petition and to review the interim orders granted on 13<sup>th</sup> July 2016 so as to cover and in the interim to prohibit the new appointment by the cabinet secretary, Interior. The further orders were granted by the court on 3<sup>rd</sup> August 2016 and the two applications were consolidated and heard on 5<sup>th</sup> September 2016.

## **Submissions**

### **Petitioner**

7. The applicant submits the initial gazette Notice No 367/2016 and 4633/2016 issued pursuant to the appointment of the 2<sup>nd</sup> interested party by the President was a nullity *abinito*, it being not in dispute that the President had no authority to appoint the executive chairman of the 1<sup>st</sup> interested party. The president acted pursuant to powers granted him in Section 7(3) of the state corporations Act, Cap 44 of the laws of Kenya. It however came to light that the Betting control and Licensing Board was not a state corporation in terms of state corporations Act, aforesaid and the Attorney General conceded that fact and sought to rectify the error by the latter appointment by the cabinet secretary.

8. The petitioner further submits that the said appointment contravened section 3(1) (a) of the Betting Lotteries and Gaming Act which provides that the chairperson of the Betting Control and Licensing Board shall consist of;

*“a chairman not being a public officer to be appointed by the Minister by notice in the gazette”.*

9. That section 7(3) of the state corporations Act applies only to state corporations established under the Act, is not applicable to the 1<sup>st</sup> interested party and cannot be invoked to overthrow the express will or parliament in section (3) (1) (a) of the Betting Lotteries and Gaming Act.

10. The petitioner argues further that the cabinet secretary interior, lacks legal capacity to revoke an appointment done by the president as he purported to do vide the 2<sup>nd</sup> gazette notice No 5356 of 12<sup>th</sup> July 2016. That one cannot revoke a decision of his or her principal. Only the President of Kenya the 1<sup>st</sup> respondent can revoke his own decision in terms of Article 135 of the constitution which provides;

*“A decision of the President in performance of any function of the president under this constitution shall bear the seal and signature of the President”*

11. The gazette notice of 12<sup>th</sup> July 2016 by the cabinet secretary interior reads “*Gazette Notice No 4633 of 2016 is revoked*”. It is submitted by the petitioner that this act cannot revoke the initial appointment by the President and since the appointment by the President was contrary to the law and therefore null and void the court should declare that the incumbent who still has unserved term of his three (3) years tenure remains in office and ought to continue serving the term to the end.

12. The petitioner further invokes Article 41(1) of the constitution which proclaims that every person including chairmen of state corporations serving a predetermined term as in the case of the 3<sup>rd</sup> interested party a 3 years term have a right to fair labour practices. That the pedestrian manner of terminating their term does not meet constitutional threshold. The petitioner submitted further under Article 47 of the Constitution which proclaims that administrative action must be expeditious, efficient, lawful, reasonable and procedurally fair was violated by the conduct of the cabinet secretary interior. That this Article has been operationalized vide the Fair Administrative Act 2015 in which the threshold has been restated.

13. That the 3<sup>rd</sup> Interested party is entitled to equal protection of the law especially as between himself and the 2<sup>nd</sup> interested party who now purports to take over the position held by the 3<sup>rd</sup> interested party while he is serving his term and has not been given any notices nor any reasons for the sudden termination of the same. The petition prays that the interim orders be confirmed pending the hearing and determination of the petition.

### **Respondent’s 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties submission**

14. The Respondents and 1<sup>st</sup> and 2<sup>nd</sup> interested parties filed written submissions on 5<sup>th</sup> September 2016. The nub of the submissions is as follows;

15. That the matter is already spent by dint of special Gazette Notice No. 5356 issued on the 12<sup>th</sup> July 2016 which essentially revoked notice No 4633 and 367 both of 2016. That a similar suit JR Cause No 278 of 2016 filed by the 3<sup>rd</sup> interested party herein which raised similar substantive issues with the instant petition was withdrawn on 25<sup>th</sup> July 2016 after the issuance of special Gazette Notice No. 5356 by the 2<sup>nd</sup> Respondent herein on the 12<sup>th</sup> July 2016. That prohibitory orders can only issue to prohibit actions which have not taken place.

16. That the orders issued on 3<sup>rd</sup> August 2016 to the effect;

*“That the order issued on 13<sup>th</sup> July 2016 be and is hereby varied in terms of the draft order annexed as “0002” was not issued in open court and do not reflect the actual intention and directions of the court during the court proceedings on the 3<sup>rd</sup> August 2016”.*

17. That the court needs to determine whether the adverse orders issued on 3<sup>rd</sup> August 2016 should be set aside and determine where the balance of convenience lie between the public interest at large and the interest of the petitioner.

### **Determination**

18. Interim orders were issued pursuant to the application dated 4<sup>th</sup> August 2016. Subsequently, the interim orders were varied pursuant to a new filing by the respondents introducing fresh Gazette Notice that affected the subject of the initial interim orders. For the record, the varied order issued on 3<sup>rd</sup> August 2016 was issued in open court and reflects the true intention and direction of the court which was to have the status quo *ante* maintained until the hearing and determination of this application. The determination of this application is also intended to dispose of the application subsequently filed by the Hon Attorney

General on behalf of the respondents on 5<sup>th</sup> August 2016 since it was aimed at setting aside the orders of the court issued on 3<sup>rd</sup> August 2016 in the initial application.

19. It is not correct that the orders issued on 3<sup>rd</sup> August 2016 were issued after the subject matter of the suit had abated. The fact of the matter is that the court issued interim orders on 13<sup>th</sup> July 2016 protecting the status quo ante and effectively placed the 3<sup>rd</sup> interested party in office of the chairman of the 1<sup>st</sup> interested party, the Betting Control and Licensing Board. The Gazette Notice subsequently issued by the 2<sup>nd</sup> respondent could not set aside the valid orders of the court. The matter was subjudice and therefore the 2<sup>nd</sup> Gazette Notice could not take effect as alleged by the respondents or at all.

20. The application before court seeks protection of the employment contract between the 1<sup>st</sup> and the 3<sup>rd</sup> interested party pending hearing and determination of amended petition. The issue for determination is whether the applicant has satisfied the requirements for grant of interim injunction pending the hearing and determination of the petition. In the case of **Giella –Vs- Cassman Brown company Limited [1973] EA 338** relied upon by the court of appeal in **Mrao Limited –Vs- First American Bank of Kenya Limited and 2 Others Civil Appeal No 39 of 2002**, the court of appeal at Mombasa per Kwach, Bosire and O’Okubasu JJA held;

*“The principles for granting an interlocutory injunction are that;*

*a. The applicant must show a prima facie case with a probability of success.*

*b. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages*

*c. If the court is in doubt it will decide an application on the balance of convenience”.*

21. The court went on to say;

*“a prima facie case in civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for explanation or rebuttal from the latter”.*

22. From the amended petition, the court is being called upon to intervene and determine the legal and constitutional validity of the purported removal from office of the 3<sup>rd</sup> interested party by the respondents while his three (3) year appointment term had not lapsed for no reasons assigned and his replacement by the 2<sup>nd</sup> interested party.

23. Whereas it is trite law and following the decision of the East Africa court of justice in **Mary Aliviza and Okoth Mondol –Vs- Attorney General of Kenya & Secretary General of East Africa Community EALS 2005 – 2011 P4** at this stage of proceedings the court is minded to refrain from making any determination on the merits of the case or any defence of it, the court is satisfied that there is a genuine and arguable case made out by the petitioner at this stage. The petitioner has therefore satisfied the first hurdle.

24. Furthermore, no reasons have been assigned the purported removal of the 3<sup>rd</sup> interested party from the position held by him and is yet to serve his three year term. The court is entitled to infer that at this stage that no public interest is at peril by fact of the 3<sup>rd</sup> interested party’s continued tenure of office pending the hearing and determination of the suit.

25. The value of holding high office is not only monetary in nature. The holding of office combines aspects of human dignity and the right not to be discriminated against without just cause shown. We also

are entitled to equal treatment in public placement and before the law barring any disqualifying factors. At this stage the court accords that benefit to the incumbent, the 3<sup>rd</sup> interested party herein.

26. Accordingly, the application succeeds with the consequence that the 3<sup>rd</sup> interested party remains in office pending the hearing and determination of this petition.

27. Costs to follow the outcome.

**Dated and delivered at Nairobi this 7<sup>th</sup> day of October, 2016**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**