



**Sheria Mtaani na Shadrack Wambui & another v Judicial Service Commission
(Judicial Review E003 of 2021) [2021] KEELRC 1321 (KLR) (2 June 2021) (Ruling)**

Sheria Mtaani na Shadrack Wambui & another v Judicial Service Commission [2021] eKLR

Neutral citation: [2021] KEELRC 1321 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

JUDICIAL REVIEW E003 OF 2021

NZIOKI WA MAKAU, J

JUNE 2, 2021

BETWEEN

SHERIA MTAANI NA SHADRACK WAMBUI & ANOTHER APPLICANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

RULING

1. The Ex-Parte Applicants had on 4th February 2021 instituted proceedings for leave to commence judicial review when the Respondent raised a Preliminary Objection on the jurisdiction of the Court. The Preliminary Objection was heard and a Ruling delivered by Hon. Justice Mathews Nduma Nderi on 16th February 2021 to the effect dismissing the Preliminary Objection and granting the Ex parte Applicants leave to file their substantive motion. Pursuant to directions also given in the said Ruling of 16th February 2021, before this Honourable Court for determination is whether the leave so granted should operate as stay of the Respondent's decision to recruit Resident Magistrates on the basis of the prescribed three years post admission experience as a pre-requisite qualification for the consideration for appointment as a Resident Magistrate. The said prayer is sought by the Ex-parte Applicants in Prayer No. 2 of the Notice of Motion dated 17th February 2021 as follows:
 - i. That pending hearing and determination of the this application this Honourable Court be pleased to stay the Respondent's decision to advertising, recruiting, shortlisting, interviewing, vetting, employing 50 persons as Resident Magistrates on the basis of the qualifications listed on the Respondent's Newspaper advertisement of on or about the 27th January 2021 and through its website <<https://www.jsc.go.ke/index.php/job-vacancies-feb-2020/>> to the extent that it has prescribed a three year post admission experience to the bar as a pre requisite qualification for the consideration or appointment as a Resident Magistrate.



2. The Application is based on the grounds that the Respondent's decision to have three years' experience post admission as a requirement prejudices the appointment of qualified young advocates with less experience post admission and as such puts the Respondent at a cross purpose with its principal acclaimed objective to be an equal opportunity employer. That it is paramount that this Court grants the stay so desired for the Ex-Parte Applicants to prosecute their substantive application in order to quash the decision by the Respondent. Further, that the Respondent will not suffer any prejudice if the order sought is granted pending hearing and determination of the Application.
3. The Respondent is opposed and relied on the Replying Affidavit of Anne Amadi sworn on 4th February 2021 where she deponed that the leave so granted should not operate as stay as public interests militates against the grant of such order in the present circumstances. That the Applicants have similarly not pointed out with precision any right that has been infringed, threatened and/or denied as the Application is couched in general terms. The motion was disposed of by way of written submissions.
4. The Ex-parte Applicants submitted that the 2nd Applicant has been prejudiced as she has been locked out from applying for appointment as a Resident Magistrate notwithstanding that she has met the minimum qualifications for consideration for appointment to the said position as under Section 32(2) of the Judicial Service Act. Secondly, that since the process of recruitment is capital intensive, tax payers' money would be saved if the Court quashes the advertisement and the ensuing recruitment process and that it is in the public interest that the process is stopped at this stage (R vs Ashworth SA (Bureau Veritas) 2005 2 EA 42). They submitted that issuing an order once leave is granted is a mandate of this Court and is meant to ensure that the status quo is maintained pending hearing and determination of the main suit as provided in Order 53 Rule 1(4) as follows:

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise”

5. The Applicants further submitted that the instant case is one that requires that the leave so granted do operate as stay because the recruitment process is ongoing and has not been finalized and the Respondent has not demonstrated any prejudice it will suffer if the recruitment process is stayed. They rely on the decision in *Swift Energy Distributors Gas Limited v Energy and Petroleum Regulatory Authority & another; Abdi Ali Mohamed (Interested Party)* [2020] eKLR where D. K. Kemei J. held that the key factor for consideration is whether or not the decision or action sought to be stayed has been fully implemented and that an order of stay can be granted where the decision has not been implemented or where the same is a continuing process; so as to preserve the status quo pending the final determination of the claim for judicial review. The Applicants' submitted that there is a risk that the Respondent is in the process of shortlisting, which will render the instant proceedings otiose unless the stay is granted. They submit that Odunga J. took a similar position in *Republic v Cabinet Secretary for Transport and Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association & 8 Others* [2014] eKLR and in *James Opiyo Wandayi v Kenya National Assembly & 2 Others* [2016] eKLR. The Ex parte Applicants also cite the case of *Taib A. Taib v The Minister for Local Government & Others* [2006] eKLR where Maraga J. (as he then was) expressed himself as follows:

“As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction... In judicial review applications the Court should always ensure that the ex parte applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it



must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act....”

6. The Ex-Parte Applicants submitted that they have satisfied the requirements for grant of leave that operates as stay as elucidated in *Republic v Kenya Revenue Authority, Commissioner for Investigation and Enforcement Department Ex parte Centrica Investments* [2019] eKLR as they have shown that the 2nd Ex-Parte Applicant faces the real prospect of being locked out of the opportunity of being a Resident Magistrate together with many others who have not attained the three (3) years post admission requirement, despite being qualified. That this Court ought to find that the Application dated 17th February 2021 having satisfied the above conditions, is meritorious and that the leave so granted to them to file for Judicial Review should operate as stay so as to maintain the substratum of the issue under dispute. The Ex-Parte Applicants further submitted that they have demonstrated that the requirement for three years post admission experience is not contemplated under Section 32(2) of the Judicial Service Act. Further, that the additional requirement is therefore an ultra vires and arbitrary creation of the Respondent through its Scheme and should therefore be quashed for being in contravention with the Judicial Service Act. That there is an apparent disregard of fundamental statutory provisions by the Respondent and the purpose of the Court is to ensure that the decision-making process is done fairly and justly to all parties and that this Court should not countenance blatant breaches of statutory provisions. (*Resley v The City Council of Nairobi* [2006] 2 EA 311).
7. The Respondent submitted that the decision whether or not to grant stay pursuant to leave is discretionary and should only be granted in the most deserving of cases, as reiterated by Maraga J. (as he then was) in *Taib A. Taib v Minister for Local Government & 3 Others* [2006] eKLR. It further submitted that the question as to whether or not leave granted in judicial review proceedings should operate as stay of the impugned decision is determined by a number of key factors namely: public interest; whether or not the impugned decision has been implemented; and proportionality and equality of arms. On the limb of public interest, the Respondent submitted that Majanja J. in the case of *R v Capital Markets Authority ex parte Joseph Mumo Kivai & Another* [2012] eKLR explained and held that judicial review proceedings are public law proceedings for vindication of private rights, and the reason why public interest is a relevant consideration in the granting of stay orders. The Respondent submitted that there is an element of public interest involved in the present case because the Respondent is a public body established under the Constitution and whose mandate under the Judicial Service Act 2011 elaborates in no unclear terms the criteria that potential applicants must satisfy when applying to various vacant positions in the Judiciary. The Respondent submitted that it is conferred with the discretion to determine the level of experience that all applicants to the position of Magistrates should possess as a qualification for appointment, by Section 13(1)(f)(i) of the Principal Act and Paragraph 10 of the Third Schedule to the Principal Act which provide as follows:

“ 13 (1) In determining the qualifications of individual applicants under the Constitution, the Commission shall be guided by the following criteria:-

- (f) legal and life experience elements of which shall include -



- (i) the amount and breadth of legal experience and the suitability of that experience for the position, including trial and other courtroom experience and administrative skills;

Paragraph 10:

"In selecting candidates for appointment, promotion and transfer, the Commission shall have regard to the efficiency of the Judiciary and, in considering public officers for promotion, merit and ability shall be taken into account as well as seniority, experience and official qualifications; and as between public officers' qualifications, proved merit and suitability for the vacancy in question, shall be given greater weight than seniority".

8. Further, it was submitted that it is in the same vein that pursuant to Section 47 of the Principal Act the Respondent adopted the Scheme for better carrying out of its mandate and thus acted lawfully in advertising for the position of Resident Magistrate within its aforementioned mandate. The Respondent relies on the court's position in *R (H) v Ashworth Special Hospital Authority* 1 WLR 127, where Dyson L.J held that where there is a public interest element involved, the Court has to strike a balance between the rights of an individual and the public interest, and in striking that balance, the Court should usually refuse to grant a stay unless satisfied that there is a strong, and not merely an arguable, case that a tribunal's decision was unlawful (cited with authority in *Republic v National Hospital Insurance Fund Management Board Ex parte Patanisho Maternity and Nursing Home* [2019] eKLR, at para 24). The Respondent thus submitted that the Applicants have not presented a strong case that its Decision was unlawful and that for this reason alone they urge the Court to dismiss this application for stay.
9. As to whether leave should operate as stay in consideration of the twin principle of proportionality and equality of arms, the Respondent urged the Court to find that the scales of justice tilts in favour of the Respondent. It submitted that the twin principle was elaborated in the case of *Beatrice Kwamboka v Leader of Majority Party of the Nairobi County Assembly* [2016] eKLR as follows:

"In other words the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not always opt for the lower rather than the higher risk of injustice".
10. It is the Respondent's submission that costs follow the event as a matter of general principle and that the successful party will always have costs of his success unless the Court has good reason to order otherwise. In support of this submission, it relies on the case of *Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd*, Judicial Review No.6 of 2014, which was cited with approval in *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* [2016] eKLR and the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] eKLR. It further submitted that prayer No. 2 of the Applicant's application dated 17th February 2021 is unmerited and ought to be dismissed with costs to the Respondent.



11. In its Further Submissions, the Respondent notes that contrary to the Court's directions, the Ex parte Applicants' have veered off by rather prematurely and cunningly submitting on the main motion of their application in their submissions dated 24th March 2021. The Respondent submitted that this Honourable Court should not consider the first issue of the Ex parte Applicants' submissions and which view is fortified in the case of Republic v Nairobi City Council & Another [2014] eKLR where an interested party's intention to convert an application to set aside leave and stay granted into the main motion in the proceedings was thwarted by the Court. It thus urges this Court to expunge Paragraphs 9-34 of the Ex parte Applicants' submissions which address issues reserved for the main motion.
12. The Respondent further refers the Court to paragraphs 4.5 and 4.6 of the Respondent's Submissions dated 12th March 2021 being proof that it has demonstrated the prejudice it will suffer if the stay order is granted. It submitted that the Ex parte Applicants' on the other hand have not impeached the credibility of the Magistrates Scheme of Service which provides for the three (3) years' post admission experience as part of the requirements for appointment as a Resident Magistrate. That the Applicants have thus not demonstrated that the Respondent's decision as contained in the advertisement is unlawful and as submitted hereinabove. It urged the Court not to allow the misguided and misinformed private interests of the Ex parte Applicant, which have not materialized, to trump upon the public interest and administration of justice.
13. In judicial review when giving an order for leave to commence these proceedings, if the Court does not give a stay, one cannot bifurcate the motion and seek to have the issue of stay revisited. In this case, the learned Judge in granting leave to commence judicial review herein did not give stay or order that such leave do operate as stay. As such the ship sailed when my brother declined to order that leave do operate as stay. I decline the motion but order that each party bears their own costs for the motion before me. I need not delve further into the various aspects of the submissions made by the Ex parte Applicants as they are for the main Application. Immediately after the delivery of this Ruling the Court will give directions for the disposal of the Judicial Review herein.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JUNE 2021

NZIOKI WA MAKAU

JUDGE

