



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

JUDICIAL REVIEW MISC. APP. NO. E004 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE BY EMBU MEDICAL AND DENTAL CLINIC,

ZIWANI MEDICAL CLINIC, WANAINCHI MEDICAL CLINIC & OPTICIANS,

MAKINI MEDICAL PEDIATRIC CLINIC, FREEVANE HOSPITAL,

NJOKI MEMORIAL MEDICAL CLINIC, EMBU COMPREHENSIVE

EYE CARE SERVICES CLINIC FOR JUDICIAL REVIEW ORDERS OF

CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ARTICLES 19(2), 21(1), 23 (F), 24(2) (A &B), 40,

47(1) (2), 191(2) AND 209(5) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 4(3), 4, 5 AND 6 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2016

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF SECTION 12 (1) AND PART 21(A) THIRD

SCHEDULE OF EMBU COUNTY GOVERNMENT FINANCE ACT, 2016

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF PAYMENT OF SINGLE BUSINESS PERMIT FEES

BETWEEN

THE REPUBLIC.....APPLICANT

THE COUNTY GOVERNMENT OF EMBU.....RESPONDENT

AND

PETERSON KAMAU MUTO T/A EMBU MEDICAL AND DENTAL CLINIC.....1ST EXPARTE APPLICANT

ABDALLA JUMA KABUTO T/A ZIWANI MEDICAL CLINIC.....2ND EX PARTE APPLICANT

AGNES WANJIRU MUTHUI T/A WANAINCHI MEDICAL CLINIC & OPTICIANS....3RD EXPARTE APPLICANT

KAIMU ABUBAKAR KARUIRIA T/A MAKINI MEDICAL PEDIATRIC CLINIC.....4TH EX PARTE APPLICANT

CHARLES ANTHONY KIMANDU T/A FREEVANE HOSPITAL.....5TH EX PARTE APPLICANT

WARUI MUNENE ELIUD T/A NJOKI MEMORIAL MEDICAL CLINIC.....6TH EX PARTE APPLICANT

JAMES GAKINYA KARIENYE T/A EMBU

COMPREHENSIVE EYECARE SERVICES CLINIC.....7TH EX PARTE APPLICANT

RULING

1. By way of a Chamber Summons brought under Articles 19(2), 21(1), 22, 23(f), 24(2) (a&b), 40, 47(1)(2), 191(2) and 209(5) of the Constitution, Section 4(3), 4, 5 and 6 of the Fair Administrative Actions Act, Sections 8 and 9 of the Law Reform Act Cap 26 and Order 53 of the Civil Procedure Rule, 2010 and dated 29.09.2021, the *ex parte* applicants moved this court seeking for the following orders; -

i. Spent.

ii. That leave be granted to the ex parte applicants to institute judicial review proceedings to apply for order of certiorari directed at the County Government of Embu to remove and bring to this Honourable Court its decision to levy and demand payments and executing its demand by seizing and carrying away the 1st ex-parte applicant's stethoscope and auroscope kit while issuing them with bonds to appear in court on 01.09.2021 for failing to take out single business permit and returning the seized items.

iii. That leave be granted to the ex parte applicants to institute judicial review proceedings to apply for order of prohibition directed at the County Government of Embu prohibiting it from levying, demanding payments and/ or executing their demand by seizing and carrying away of any equipment belonging to the ex-parte applicants and used by them for the purposes of operating their specific clinics in future under the pretext of enforcing single business permit fees or otherwise.

iv. That the said leave if granted to operate as stay of the decision of the County Government of Embu to levy, demand or execute the decision by seizure of property or equipment in the premises of the ex parte applicants or issuing bonds for court attendance and invoice for purpose of enforcing payment of single business permit fees upon the ex parte applicants pending the hearing and determination of this suit.

v. That the respondent be ordered to release the illegally seized stethoscope and auroscope kit back to the 1st ex parte applicant's possession as the same are extremely necessary for operations in the clinic.

vi. That any other and further relief that this Honourable Court may deem fit and just to grant in the circumstances.

2. The application is premised on the grounds on the face of the application, the annexed affidavit by the *ex-parte* applicants and further, on the statement of facts at the leave stage. In a nutshell, it is the *ex parte* applicants' case that they are medical practitioners and representatives of the aforestated clinics and fully licensed to operate as such by the Medical Practitioners and Dentists Board and have a regulatory body wherein they pay annual fee to practice and to which they have paid. That as such, the respondent does not have any mandate over the same and cannot regulate professionals such as them and demand payment for business permit fees as they make practice fee payment to a professional body. That the respondent's employees entered the ex-parte applicants' premises and demanded payment of the business permit fees, issued them with bonds to appear in court on 01.09.2021 and further carted away the 1st ex parte applicant's stethoscope and auroscope kit. That there was no formal demand for the fees or reason as to why the ex parte applicant was being subjected to pay the fees as the applicants operate as professionals. Further, there was never service of a prior written notice to demand payment of the business permit fees and that as professionals, they pay license fees to the regulatory board which operate as practice permit and demanding the business permit from them would subject them to double taxation and which act is arbitrary and not justiciable.

3. Directions were given that the applicants file submissions to the said application and wherein the applicants generally submitted that the application herein meets the threshold for grant of leave to apply for judicial review orders sought as the parties had demonstrated an arguable case warranting the grant of leave. The applicants inter alia relied on the case **Republic v Public Procurement Administrative Review Board & 2 Others Ex Parte MIG International Limited & Another [2016] eKLR.**

4. I have considered the application herein and further perused through the annexures thereto. I have further considered the applicants' written submissions and it is my considered view that the main issue for determination is whether the same is merited.

5. As I have already noted, the gist of the application is leave by the applicants to commence judicial review proceedings. Under Order 53 Rule 1 of the Civil Procedure Rules 2010, it is mandatory that an applicant in such an application must seek leave before he can file the substantive application.

6. It is trite that judicial review is more concerned with the manner in which a decision is made than the merits of the decision. The court is concerned with the lawfulness of the process by which the decision is made. The grounds upon which an order of judicial review can issue include where the decision complained of is tainted with illegality, irrationality and procedural impropriety (where there is failure to act fairly on the part of the decision-making authority in the process of taking a decision) or where the rules of natural justice are not complied with. It may also be issued where the decision is made without or in excess of jurisdiction. [See **Republic v National Land Commission & another Ex-parte Farmers Choice Limited (2020) eKLR**].

7. The reasons for leave were explained by Waki J. (as he then was) in **Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** and the dictum in that decision is that, leave is meant to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; 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; 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.

8. The Learned Judge further held that leave may only be granted 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. Granting of leave to file for judicial review is an exercise of the court's discretion but as always it has to be exercised judiciously.

9. It is therefore clear from the above that in an application for leave such as the present one, this court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave.

10. The applicants aver that the respondent's employees entered the premises of the 1st ex parte applicant and demanded payment of the business permit fees, issued him with a bond to appear before court on 01.09.2021 and unlawfully carted away the 1st ex parte applicant's stethoscope and auroscope kit. As such, the application was filed within the six months' statutory timeframe as provided for under Section 9 (3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules, 2010 and as such it's brought within the statutory timeframes.

11. The ex-parte applicants herein seek leave for orders of certiorari and prohibition to remove into this court and quash the decision to demand payment of the business permit fees and unlawfully carting away of the 1st ex parte applicant's stethoscope and auroscope kit on the grounds that the decision was done without prior notice to demand payment and thus a denial of an opportunity to present their case as to why they ought not to pay the fees as demanded and that the demand of business permit fees by the respondent would subject them to two tax regimes which would be double taxation; and further that, the respondent has acted outside its mandate and as such failed to meet the expectations of the law and that the same is unlawful.

12. To this extent, and in light of the evidence adduced, and upon a cursory perusal of the evidence before court and without delving into the arguments by the ex-parte applicants, it is my view that the case is sufficiently meritorious to justify leave. It cannot be said to be frivolous or vexatious.

13. On the question of whether the said leave should operate as a stay of the impugned actions by the respondent's and decision to levy fee on the ex parte applicants, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. Order 53 Rule 1(4) of the Civil Procedure Rules provides as follows in this respect:

“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.”

14. In **R (H). v Ashworth Special Hospital Authority (2003) 1 WLR 127**, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The main consideration is always whether or not the decision or action sought to be stayed has been fully implemented. In **Taib A. Taib v The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** the court held that:-

“... 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....”

15. It is therefore clear that where the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation.

16. In the present application, the action of the respondent's employees to enter the premises of the ex parte applicants and demand payment

of the business permit fees and unlawfully carting away 1st ex parte applicant's stethoscope and auroscope kit, is a clear indication that the said action is still continuing to be implemented. There is need therefore to prevent the implementation of the said decision until the legality of the respondent's decision is established, in light of the prejudice pleaded by the ex-parte applicants. It is my view therefore that the order of stay ought to be issued.

17. In the premises aforesaid, I find that the application has merits and I do allow prayers (2), (3), (4) and (5) of the same.

18. The substantive application be prosecuted within 90 days from the date of filing, failing which the stay order granted in prayer (4) shall lapse.

19. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF FEBRUARY, 2022.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents

.....for Exparte Applicant