REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

APPLICATION NO. E021 OF 2021

CHAIRMAN, KENYA VETERINARY ASSOCIATION...APPLICANT

-VERSUS-

KENYA VETERINARY BOARD (KVB).....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

In a chamber summons dated 18 February 2021 filed under Section 10 of the Judicature Act Cap 8 of the Laws of Kenya, Rule 3(2) of the High Court (Practice and procedure) Rules, Section 1A (1) of the Civil Procedure Act, Section 8(2) of the Law Reform Act, Cap 26 of the Laws of Kenya and Order 53(1) of the Civil Procedure Rules 2010) the applicant prayed for, *inter alia*:

> **"3. THAT the Applicant be granted leave to apply for:**
>
> **a) An order of certiorari, to move this Honorable Court to quash the decision of the 1st Respondent made on Gazette letter dated 9th February, 2021 in which the Respondent has purported to conduct elections for board from 9th February, 2021 to 2nd March, 2021 which is flawed in that the provisions of legal notice no. 48 of 14th March 2013 were not followed. This unreasonably denies registrants (veterinary surgeons and veterinary paraprofessionals) from exercising their voting rights.**
>
> **b) An order of certiorari, to move this Honorable Court to quash the 1st Respondent's decision which is borne out of an illegal decision by the registrar of the board. This decision introduced a voter register which does not exist legally in the Veterinary Surgeons and Veterinary Para-Professionals Act. The Kenya Veterinary Board, according to their advertisement intends to use as the voters register the register of veterinary surgeons and register of veterinary Para-professionals as at 31st December 2020 which are unpublished, yet the Veterinary Surgeons and Veterinary Para-Professionals Act Section 20(3) is clear that any persons not in the register published on 31st March every year is deemed not registered under the Act and therefore is not eligible for nomination and cannot be a voter for the upcoming elections until the next publications of registered practitioners which shall be not later than 31st March 2021.**
>
> **c) An order of mandamus, compelling the 1st Respondent to stop the ongoing election until the proper voter register and guidelines to conduct the election is adhered to.**
>
> **d) An order of prohibition, to stop the 1st Respondent from acting either in their person or through their servants, agents, police officers, employees or anyone claiming to derive authority from the respondents, from arbitrarily interfering in any manner whatsoever curtailing/impeding the Applicant's freedom of participating in the proper elections once court order is obtained with regard to the matters herein.**
>
> **e) An order of declaration, stating that the 1st Respondent has no mandate per Veterinary Surgeon and Veterinary Paraprofessional Act Section 45 (1) & (2) (K) to introduce modalities for entry in to the board as the duty lies with the Cabinet Secretary."**

When the application was brought to the attention the Hon. Lady Justice Nyamweya, J. (as she then was), in the first instance, on 19 February 2021, the learned judge determined as follows:

> **"6. In the present application, the applicant has not provided any evidence to support his allegations, and especially of the impugned gazette of 9th February 2021. I also note that the impugned elections are ongoing, as the applicant states that they were gazetted to be held between 9th February and 2nd March 2021. The respondents therefore need to be heard on the issue of whether leave should be granted to commence judicial review proceedings herein for this reason."**

The respondents took cue and in the affidavit sworn on 25 February 2021by Dr. Indraph Mugambi Ragwa, the 1st respondent's Chief Executive Officer, the 1st respondent opposed the applicant's application on the ground that it was not supported by any evidence.

Dr. Ragwa also swore that the application had been filed after the impugned elections had begun. He further swore that in the event of any dispute and appeals arising from the elections, they are addressed by the 1st respondent. In the present case, no dispute had arisen and if there was any, the suit was premature considering that the dispute had not been brought before the 1st respondent for determination before the jurisdiction of this Honourable Court was invoked.

All that a judicial review court would ordinarily be concerned with in an application such as the instant one is whether the applicant has made out an arguable case; in other words, whether it is a case which upon consideration may merit the grant of all or any of the judicial review orders that the applicant is seeking. The leave stage of the proceedings is not meant to determine whether or not the applicant's case will succeed but whether it is arguable.

In **IRC V National Federation of Self-Employed and Small Businesses Ltd (1982) 617, (1981) 2 ALL ER 93)** Lord Diplock as explained the need for leave as follows:

> **"Its purpose is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.**"

Thus, the purposes identified for leave are one, to save the court's time and, two, so as not to leave public authorities in a state of uncertainty as to whether they can safely proceed with their operations.

In order to guard against delving into the merits of the case at the application for leave stage, Lord Diplock, **IRC V National Federation of Self-Employed and Small Businesses Ltd** (supra) suggested the following approach.

> **"If, on a quick perusal of the material then available, the court thinks the application discloses what might on further consideration turn out to be an arguable case in favor of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief."**

Thus, on this basis, the applicant only has to show not that it is, but that it might turn out to be, an arguable case.

Having considered the applicant's application and the response by the 1st respondent and having considered the submissions by the parties, I am satisfied that the observations made by the learned judge on the timing of the application were not unfounded. I say so because it is apparent that leave was sought to stop the elections that were already underway, a fact that is not only apparent on the face of the application itself but it has also been confirmed by the respondent's Chief Executive Officer.

While the application was filed on or about 20 February 2021 the elections had commenced earlier on 9 February 2021. Looking at the affidavit of the 1st respondent, the process culminating in these elections had begun even much earlier.

It follows that if the elections were conducted as scheduled, and there is no evidence to the contrary, the orders which the applicant seeks if leave were to be granted have been overtaken by events. Granting leave would therefore be an exercise in futility. In the circumstances, the applicant's application is misconceived and it is therefore declined. I make no order as to costs. It is so ordered.

SIGNED, DATED AND DELIVERED VIA VIDEO LINK ON 22ND FEBRUARY, 2022

NGAAH JAIRUS

JUDGE