



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. MISC. E006 OF 2021

BETWEEN

MUMA AND KANJAMA ADVOCATESAPPLICANT

VERSUS

NATIONAL INDUSTRIAL TRAINING AUTHORITY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

The Applications

Application for Review

1. On 19th January 2021, this Court granted Muma and Kanjama Advocates, the Applicant herein, leave to file a statement in support of its Chamber Summons application dated 15th January 2021 within fourteen (14) days. The said application was also set for hearing on 8th February 2021.

2. The Applicant has now moved this Court in an application by way of Chamber Summons dated 21st January 2021, in which it is seeking the following orders:

- 1. THAT this Application be certified urgent, heard and determined ex-parte and on priority basis.**
- 2. THAT this Court be pleased to order that the Statutory Statement dated 15th January 2021 be and is hereby deemed to be filed on 17th January 2021 in support of the Chamber Summons Application dated 15th January 2021 filed on 17th January 2021.**
- 3. THAT upon grant of prayer (2) above, Court be pleased to vary its previous direction given on 19th January 2021 requiring that the statement in support of his Chamber Summons dated 15th January 2021 be filed within fourteen (14) days from 19th January 2021.**
- 4. THAT this Court be pleased to grant any other orders as it may deem fit to further the ends of justice.**

3. The said application is supported a verifying affidavit deponed to on 21st January 2021, by Caroline Mumbi Kithuka, the Applicant's process server. The grounds for the application are that the uploading of the statement during the first attempt at filing it was successful which led to the successful generation of the fees receipt characterized as FSCA-0038622 and finally the successful payment of the assessed amount of KShs. 75/-.

4. However, that the unavailability of the electronic filing system after the Applicant had uploaded the Statutory Statement prevented the court from receiving the filed document. Lastly that the delay is prejudicial and its effect should not be borne by the Applicant since it was occasioned by a system error. The Applicant stated that it successfully effected filing of the statement on 20th January 2021.

5. The Applicant annexed a copy of the electronic filing fees receipt and extract showing the payment for and filing of the statutory statement.

6. This Court has confirmed that the said statement is now on record, and as the error arose from the Courts electronic filing system, the orders given herein on 19th January 2021 are amenable to review pursuant to the provisions of section 80 of the Civil Procedure Act and

Order 45 Rule 1 of the Civil Procedure Rules. Order 45 Rule 1 elaborates on the grounds on which a judgment or decree can be set aside as follows:

“ (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

Application for Leave

7. The effect of filing the statutory statement is that the Chamber Summons application dated 15th January 2021 is now competently filed, and as it was seeking orders *ex parte*, can also be disposed of at this stage. The Chamber Summons application dated 15th January 2021 was seeking the following orders:

1. **THAT this Application be and is hereby certified as urgent and service thereof be dispensed with in the first instance.**

2. **THAT leave be and is hereby granted to apply for Judicial Review orders of:**

a) **PROHIBITION prohibiting the 1st Respondent herein by itself or its servants or agents or otherwise howsoever from demanding any purported arrears allegedly owed by the Applicant.**

b) **CERTIORARI to move this Honourable Court to quash the decision of the 1st Respondent herein communicated on or about 17th July 2020 to demand collection and/or remittance of the allegedly owed arrears made against the Applicant.**

c) **DECLARATION that the responsibility of the 1st Respondent to charge levy begins after registration and that Section 7C of the Industrial Training Act should be read together with Section 58 and further that any attempt to levy retrospective charges by the 1st Respondent for the period before notification of registration is unconstitutional, null and void.**

d) **COMPENSATION in the form of general and aggravated damages for breach of the Applicant's constitutional right to privacy.**

3. **THAT the leave so granted operates as a stay of the demand for payment of the alleged outstanding arrears by the 1st Respondent by itself or its servants or agents or otherwise howsoever as against the Applicant.**

4. **THAT the costs of this Application be provided for.**

8. The said application is supported by an affidavit deposed to on 15th January 2021 by Charles Kanjama, a partner in the Applicant firm and the statement of the same date. In summary, the Applicant states that the 1st Respondent has computed erroneous and malicious levy arrears of Kshs. 874,575.00 owed to it by the Applicant, and that the decision by the 1st Respondent to collect the alleged outstanding arrears is unconscionable, unreasonable and irrational as it failed to appreciate that the payment is only due after the Applicant's registration, which is disputed.

9. Further, that the 1st Respondent denied the Applicant a reasonable opportunity to state its case before the decision to instruct the debt collector to demand for payment of the alleged outstanding arrears. The Applicant annexed copies of letters exchanged with the 1st Respondent on its registration status and the alleged arrears, and of an emails from a debt collector.

10. The applicable law on leave to commence judicial review proceedings is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

11. It is also trite that in an application for leave such as the present one, the 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.

12. In the present application, the Applicant has provided evidence of correspondence with the 1st Respondent on the demand for the impugned said arrears, and its registration status with the 1st Respondent. To this extent I find that the Applicant has met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondents.

13. On the question of whether the said leave can operate as a stay of the impugned report, 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) vs 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 circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision, and in various decisions by Kenyan Courts.

15. It has in this regard been held that were 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. See in this regard the decisions in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006**, **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995**, **Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR** and **James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR**.

17. In the circumstances of this application the demanded arrears are yet to be paid by the Applicant, and the 1st Respondent's demand is therefore amenable to stay. In addition, if a stay is not granted, the Applicant's application will be rendered nugatory, and the stay orders are merited to this extent.

The Orders:

18. Arising from the foregoing findings, the Chambers Summons applications dated 15th January 2021 and 21st January 2021 are allowed to the extent of the following orders:

I. The Chambers Summons applications dated 15th January 2021 and 21st January 2021 are hereby certified urgent and admitted to hearing ex parte.

II. The Statutory Statement dated 15th January 2021 is hereby deemed to be properly filed in support of the Chamber Summons Application dated 15th January 2021 and admitted to the record, and the directions and orders granted herein on 19th January 2021 requiring that the statement in support of his Chamber Summons dated 15th January 2021 be filed within fourteen (14) days from 19th January 2021 are hereby varied to this extent, and the hearing date of 8th February 2021 is vacated.

III. There shall be no order as to the costs of the Chambers Summons applications dated 21st January 2021.

IV. The Applicant is granted leave to apply for an order of prohibition prohibiting the 1st Respondent herein by itself or its servants or agents or otherwise howsoever from demanding any purported arrears allegedly owed by the Applicant against the Respondents.

V. The Applicant is granted leave to apply for an order of certiorari, to move this Court to quash the decision of the 1st Respondent herein communicated on or about 17th July 2020 to demand collection and/or remittance of the allegedly owed arrears made against the Applicant.

VI. The Applicant is granted leave to apply for a Declaration that the responsibility of the 1st Respondent to charge levy begins after registration and that Section 7C of the Industrial Training Act should be read together with Section 58 and further that any attempt to levy retrospective charges by the 1st Respondent for the period before notification of registration is unconstitutional, null and void.

VII. The Applicant is granted leave to apply for Compensation in the form of general and aggravated damages for breach of the Applicant's constitutional right to privacy

VIII. The leave so granted herein shall operate as a stay of implementation or enforcement of the demand for payment of outstanding arrears by the 1st Respondent by itself or its servants or agents or otherwise howsoever as against the Applicant, pending the hearing and determination of the Applicant's substantive application or until further orders of this Court.

IX. The costs of the Chamber Summons dated 15th January 2021 shall be in the cause.

X. The Applicant shall file the substantive Notice of Motion, and shall serve the Respondents with (i) the Chamber Summons applications dated 15th January 2021 and 21st January 2021, (ii) the substantive Notice of Motion and submissions thereon,

(iii) a copy of this ruling, and (iii) a mention notice, within twenty-one (21) days from today's date.

XI. Upon being served with the said pleadings and documents, the Respondents shall be required to file their responses to, and submissions on the substantive Notice of Motion within twenty-one (21) days from the date of service.

XII. This matter shall be mentioned on 19th April 2021 to confirm compliance and for further directions.

XIII. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the Applicant's substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

XIV. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.

XV. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XVI. The parties shall also be required to file and send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XVII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 19th April 2021.

XVIII. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant by electronic mail by close of business on Monday, 25th January 2021.

XIX. Parties shall be at liberty to apply.

19. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF JANUARY 2021

P. NYAMWEYA

JUDGE