



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. MISC E004 OF 2021**

REPUBLIC.....APPLICANT

VERSUS

THE CABINET SECRETARY, MINISTRY OF AGRICULTURE LIVESTOCK, FISHERIES

AND CO-OPERATIVES.....1<sup>ST</sup> RESPONDENT

THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

THE PRINCIPAL SECRETARY STATE DEPARTMENT LIVESTOCK....3<sup>RD</sup> RESPONDENT

THE CHIEF EXECUTIVE OFFICER KENYA VETERINARY BOARD.....4<sup>TH</sup> RESPONDENT

EX PARTE APPLICANTS:

1. BENSON ODUOR AMEDA

2. QUEEREENUSE PACHO OLUOCH

**RULING**

**The Application**

1. The *ex parte* Applicants, Benson Oduor Ameda, and Queereenuse Pacho Oluoch, (hereinafter referred to as “the 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants” respectively), have filed an application by way of a Chamber Summons dated 11<sup>th</sup> January 2021, seeking the following orders:

1. THAT the application be certified as urgent and service be dispensed with in the first instance.

2. THAT the Applicants herein be granted leave to apply for an order of Certiorari quashing Gazette Notice No. 14 dated 6th January, 2021 purporting to revoke the appointment of Dr Christopher H.Wanga, Dr Jafred M.A. Kitaa, Mr Paul Kariuki Ndungu, Mr Benson Oduor Ameda, Mr Queereenuse Pacho as members of Kenya Veterinary Board .

3. THAT the leave granted to apply for the orders of Certiorari do operate as stay of implementation of Gazette Notice No. 14 dated 6th January, 2021 purporting to revoke the appointment of of Dr Christopher H.Wanga, Dr Jafred M.A. Kitaa, Mr Paul Kariuki Ndungu, Mr Benson Oduor Ameda, Mr Queereenuse Pacho as members of Kenya Veterinary Board.

4. THAT the Applicants herein be granted leave to apply for an order of prohibition against the 1st Respondent prohibiting him from interfering with the functioning, the membership and/or operations of the Kenya Veterinary Board.

5. THAT the Applicants herein be granted leave to apply for an order of prohibition prohibiting the 1st respondent from interfering with Kenya Veterinary Board elections scheduled to be conducted within three months, including the process and outcome or carrying out a selective appointment of the elected representatives contrary to the provisions of the Veterinary Surgeons and Veterinary Paraprofessionals Act and Regulations.

## 6. THAT the costs of the application be provided for .

2. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 11<sup>th</sup> January 2021, a verifying affidavit sworn on the same date by the 1<sup>st</sup> *ex parte* Applicant, and a supporting affidavit sworn by Herine Akoth Kabita, the *ex parte* Applicants' advocate on record. In summary, the *ex parte* Applicants claim that in total disregard to the law, and in abuse of powers of the office of the Cabinet Secretary, the 1<sup>st</sup> Respondent through Gazette Notice No. 14 of dated 6th January 2021 purported to revoke the appointment of Dr Christopher H.Wanga, Dr Jafred M.A. Kitaa, Mr Paul Kariuki Ndungu, Mr Benson Oduor Ameda and Mr Queereenuse Pacho as members of the Kenya Veterinary Board.

3. Further, that the action by the 1<sup>st</sup> Respondent undermines the provision of Section 4(1)(f)(g) of the Veterinary Surgeons and Veterinary Para-Professionals Act and Section 5 (1) (f), and the *ex parte* Applicants are apprehensive that the 1st Respondent will interfere with the elections of members of the Kenya Veterinary Board scheduled to be conducted within three months, contrary to the provisions of the Veterinary Surgeons and Veterinary Paraprofessionals Act and Regulations.

4. The 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants annexed copies of the Gazette Notice No. 2609 dated 20<sup>th</sup> March 2018 appointing them as members of the, Kenya Veterinary Board; of Gazette Notice No. 14 of dated 6th January 2021, and of relevant sections of the Veterinary Surgeons and Veterinary Paraprofessionals Regulations of 2013.

### The Determination

5. Upon careful consideration of the application dated 11<sup>th</sup> January 2021 and the reasons offered in support of the urgency, I am satisfied that the 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants have demonstrated that this matter is urgent, and that the same ought to be heard on a priority basis, in light of the imminent election of new members of the Kenya Veterinary Board.

6. On the orders sought by the 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants for leave to commence judicial review proceedings, the applicable law 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.

7. 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 a cursory perusal of the evidence before the court, and make a decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) 1 WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

8. In the present application, the *ex parte* Applicants have provided evidence of their appointment and of the impugned gazette notice, and advanced the grounds why they consider the 1<sup>st</sup> Respondent's decision to be illegal. To this extent I find that the 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants have met the threshold of an arguable case, and are therefore entitled to the leave sought to commence judicial review proceedings against the Respondents.

9. 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.”**

10. 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.

11. The main factor is whether or not the decision or action sought to be stayed has been fully implemented. It was thus held in **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. A similar decision was made by Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** .

12. This factor was also discussed in **R (H). vs Ashworth Special Hospital Authority (supra)** where Dyson L.J. held as follows:

**“As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.”**

13. It therefore follows 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.

14. In this regard, it is not evident what implementation measures will be required to implement the decision by the 1<sup>st</sup> Respondent revoking the appointment of the *ex parte* Applicants. In addition, there is need to give the parties an opportunity to indicate what prejudice if any, they may suffer if stay is granted or otherwise.

### **The Orders**

1. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 11<sup>th</sup> January 2020 is found to be merited to the extent of the following orders:

**I. The 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants' Chamber Summons application dated 11<sup>th</sup> January 2021 is hereby certified as urgent, and is hereby admitted for hearing *ex parte* in the first instance.**

**II. The 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants are granted leave to apply for an order of Certiorari quashing Gazette Notice No. 14 dated 6th January, 2021 purporting to revoke the appointment of Dr Christopher H.Wanga, Dr Jafred M.A. Kitaa, Mr Paul Kariuki Ndungu, Mr Benson Oduor Ameda, Mr Queereenuse Pacho as members of Kenya Veterinary Board .**

**III. The 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants are granted leave to apply for an order of prohibition against the 1st Respondent prohibiting him from interfering with the functioning, the membership and/or operations of the Kenya Veterinary Board.**

**IV. The 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants are granted leave to apply for an order of prohibition prohibiting the 1st Respondent from interfering with Kenya Veterinary Board elections scheduled to be conducted within three months, including the process and outcome or carrying out a selective appointment of the elected representatives contrary to the provisions of the Veterinary Surgeons and Veterinary Paraprofessionals Act and Regulations.**

**I. Prayer (3) of the Chamber Summons dated dated 11<sup>th</sup> January 2021 seeking orders that the grant of leave herein do operate as a stay of implementation of Gazette Notice No. 14 dated 6th January, 2021 purporting to revoke the appointment of of Dr Christopher H.Wanga, Dr Jafred M.A. Kitaa, Mr Paul Kariuki Ndungu, Mr Benson Oduor Ameda, Mr Queereenuse Pacho as members of Kenya Veterinary Board, shall be heard at an *inter partes* hearing to be held on 22<sup>nd</sup> February 2021.**

**II. The 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicant shall file and serve the Respondents with (i) the substantive Notice of Motion, (ii) the Chamber Summons dated 11<sup>th</sup> January 2021 and skeletal submissions on prayer (3) thereof, (iii) a copy of this ruling, and (v) a hearing notice, within fourteen (14) days from today's date.**

**III. Upon being served with the said pleadings and documents, the Respondents shall be required to file their responses, and submissions on prayer (3) of the Chamber Summons dated 11<sup>th</sup> January 2021 within fourteen (14) days from the date of service.**

**IV. 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 prayer (3) of the Chamber Summons dated 11<sup>th</sup> January 2021 on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.**

**V. 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](mailto:judicialreview48@gmail.com) and [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).**

**VI. 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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).**

**VII. 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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).**

**VIII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 22<sup>nd</sup> February 2021.**

**IX. 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 Thursday, 21<sup>st</sup> January 2021.**

**X. Parties shall be at liberty to apply.**

2. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 19<sup>TH</sup> DAY OF JANUARY 2021**

**P. NYAMWEYA**

**JUDGE**