



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E043 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW

ORDERS OF FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE KENYA MEDICAL LABORATORY

TECHNICIANS AND TECHNOLOGISTS BOARD.....RESPONDENT

AND

PHARMACY AND POISONS BOARD.....INTERESTED PARTY

EX PARTE APPLICANT:

ASSOCIATION OF MEDICAL LABORATORY DIAGNOSTICS SUPPLIERS

Suing through its officials

John Karume- Chairman

Paul Wambura- Treasurer

Feroz Nawab - Secretary

RULING

1. The Association of Medical Laboratory Diagnostics Suppliers suing through its officials (hereinafter the *ex parte* Applicant”), is aggrieved by memos dated 21st December 2020 and 12th March 2021 issued by The Kenya Medical Laboratory Technicians and Technologists Board, the Respondent herein. The *ex parte* Applicant states that said memos directed that as a pre-requisite to renewal of their licenses, all laboratories validate all kits/reagents and equipment used for clinical lab tests with the Respondent before 31st March 2021. Further, that the Respondent requires all suppliers, vendors, distributors of test kits/reagents and equipment used for clinical tests to register with it.

2. The *ex parte* Applicant has consequently moved this Court in an application by way of a Notice of Motion under certificate of urgency dated 25th March 2021 seeking that the application be certified urgent and be admitted to hearing on a priority basis during the vacation period. The *ex parte* Applicant seeks the following orders in the substantive Chamber Summons application also dated 25th March 2021:

1. **THAT the application be certified as urgent and be heard in the first instance "ex parte ".**
2. **THAT the Court be pleased to grant leave to the Applicant to apply for an order of Certiorari to remove into this court**

and quash the Memos dated 21st December 2020 and 12th March 2021 requiring kits/reagents and equipment used for clinical lab tests to be validated by the Respondent and all suppliers, vendors and distributors to be registered with the Respondent.

3. THAT the Court be pleased to grant leave to the Applicant to apply for an order of Prohibition to prohibit and restrain the Respondent either by itself, agents, employees or whatsoever from taking steps, actions and measures to enforce its Memo dated 21st December 2020.

4. The leave sought to operate as stay of the decision, directives and acts of the Respondent until determination of the application herein or until the Court orders otherwise.

5. THAT in the alternative without prejudice to the foregoing, an order of status quo ante be granted and/or be maintained pending hearing and determination of this suit.

6. THAT costs of this application be provided for.

3. The applications are supported by a supporting affidavit sworn on 25th March 2021 by Isaac Omeke Miencha, the *ex parte* Applicant's Advocate on record, a verifying affidavit sworn on the same date by Feroz Nawab, the *ex parte* Applicant's Secretary, and a Statutory Statement also dated 25th March 2021. In summary, the *ex parte* Applicant claims that the impugned memos are unprocedural, unreasonable, illegal, unconstitutional and an infringement of the *ex parte* Applicants members legitimate expectation. The grounds for the alleged illegalities are elucidated in the application.

4. The *ex parte* Applicant annexed copies the authority given to its officials and advocates authority to represent it and act on its behalf; of the impugned memos, as well as copies of a memo from the Ministry of Health and correspondence from the Interested Party on the subject matter of the impugned memos.

The Determination

5. I have considered the application dated 25th March 2021 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicant has demonstrated that this matter is urgent in light of the timelines imposed by the Respondent on the applications for renewal of the *ex parte* Applicant's members' licences.

6. On the orders sought by the *ex parte* Applicant 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 cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. In the present application, the *ex parte* Applicant has provided evidence of the impugned memos by the Respondent and has also averred to the grounds and reasons why it considers the Respondent's action to be unlawful and illegal.

8. To this extent I find that the *ex parte* Applicant has met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondent.

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. 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. 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**.

12. In the present application the deadline for compliance with the impugned memos in terms of applications for registration is 31st March

2021, and they are therefore amenable to stay. However, I note that the *ex parte* Applicant has averred that the Interested Party has over the years exercised the role contemplated in the impugned memos, that this position was clarified by the Ministry of Health and the Interested Party. In addition, that there have been previous judicial review proceedings, namely Judicial Review Miscellaneous Application No. 229 of 2014 with regard to the mandate of the Interested Party to regulate laboratory equipment and reagents, which were withdrawn by consent

13. It is thus evident that the Ministry of Health and Attorney General are necessary parties in the current proceedings, so as to address the apparent conflict in the respective statutory roles of the Respondent and Interested Party. For the same reason, the Interested Party, Ministry of Health and Attorney General need to be given an opportunity to respond before any orders of stay or *status quo* can be granted. Lastly, the subject of the impugned memos is the renewal of the *ex parte* Applicant's members' laboratory facility licences for 2021, and it is not evident what the current status is as regards the licences of the *ex parte* Applicant's members, as they have not availed any evidence in this regard.

14. In the circumstances, the orders of stay and *status quo* sought will be canvassed *inter partes*, and any prejudice caused to the *ex parte* Applicant can be addressed by appropriate orders, in the event that this Court finds that the prayers are merited.

The Disposition

15. In light of the foregoing observations and findings, the *ex parte* Applicant's Notice of Motion and Chamber Summons applications dated 25th March 2021 are found to be merited only to the extent of the following orders:

I. The *ex parte* Applicant's Notice of Motion and Chamber Summons applications dated 25th March 2021 are hereby certified as urgent, and the same are hereby admitted to hearing during the court recess.

II. The Cabinet Secretary, Ministry of Health and the Attorney General are joined as the 2nd and 3rd Interested Parties respectively in this suit.

III. The *ex parte* Applicant is granted leave to apply for an order of Certiorari to remove into this court and quash the Memos dated 21st December 2020 and 12th March 2021 requiring kits/reagents and equipment used for clinical lab tests to be validated by the Respondent, and all suppliers, vendors and distributors to be registered with the Respondent.

IV. The *ex parte* Applicant is granted leave to apply for an order of Prohibition to prohibit and restrain the Respondent either by itself, agents, employees or whatsoever from taking steps, actions and measures to enforce its Memo dated 21st December 2020.

V. Prayers 4 and 5 of the Chamber Summons application dated 25th March 2021 that the leave sought operates as stay of the decision, directives and acts of the Respondent until determination of the application herein or until the Court orders otherwise, or that in the alternative an order of *status quo* ante be granted and/or be maintained pending hearing and determination of this suit, shall be canvassed at an *inter partes* virtual hearing.

VI. The *ex parte* Applicant shall file and serve the Respondent and Interested Parties with (i) the substantive Notice of Motion (ii) the Notice of Motion and Chamber Summons dated 25th March 2021 and their supporting documents, (iii) skeletal submissions on prayers 4 and 5 of the Chamber Summons application dated 25th March 2021 (iv) a copy of this ruling, and (v) a hearing notice, within seven (7) days from today's date.

VII. The Respondent and Interested Parties are granted leave to file their responses to prayers 4 and 5 of the Chamber Summons application dated 25th March 2021 and skeletal submissions thereon within seven (7) days from the date of service by the *ex parte* Applicant.

VIII. Timelines shall be strictly observed

IX. 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 prayers 4 and 5 of the Chamber Summons application dated 25th March 2021 and the *ex parte* Applicant's substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

X. 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.

XI. 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.

XII. The parties shall also be required to file their respective affidavits evidencing service in the Judiciary's e-filing system.

XIII. The *inter partes* hearing of prayers 4 and 5 of the Chamber Summons application dated 25th March 2021 shall be held virtually by video link on 14th April 2021 at 3.00 pm.

XIV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for a virtual hearing on 14th April 2021 at 3.00pm.

XV. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the *ex parte* Applicant by electronic mail by close of business today, 29th March 2021, and shall send the electronic link for the virtual hearing to the parties on record by close of business on 13th April 2021.

XVI. Parties shall be at liberty to apply.

16. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF MARCH 2021

P. NYAMWEYA

JUDGE