



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW CASE NO. 36 OF 2019

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA NATIONAL EXAMINATION COUNCIL.....1ST RESPONDENT

MINISTRY OF EDUCATION.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

EX PARTE APPLICANTS:

CAHIRMAN AND FORM FOUR PARENTS' ASSOCIATION 2018 IKHLAS INTERGRATED

HIGH SCHOOL (Suing on behalf of Parents of IKHLAS INTERGRATED HIGH SCHOOL)

RULING NO 4

1. This matter was reserved for judgment on 29th June 2021, after a mention held on 18th May 2021 to confirm the status of the application for stay in the Court of Appeal.

2. The 1st Respondent's counsel subsequently filed an application under certificate of urgency by way of a Notice of Motion dated 26th May 2021, seeking the following orders:

- 1) THAT this application be certified as urgent and service be dispensed with in the first instance.
- 2) THAT the Honorable Court be please to arrest the delivery of the Judgement in this matter on 29th June 2021 pending inter partes hearing of this Application.
- 3) THAT the Honorable Court be pleased to arrest the delivery of the Judgement in this matter on 29th June 2021 pending the hearing and determination of this Application.
- 4) THAT the Honorable Court be pleased to stay any further proceedings pending the determination of Civil Appeal No. 500 of 2019.

IN THE ALTERNATIVE AND WITHOUT PREJUDICE:

- 5) THAT the Honorable court be pleased to grant leave to the 1st Respondent to file written submissions out of the prescribed time.
- 6) THAT the Honorable Court be pleased to enlarge time by seven (7) days for the 1st Respondent to file and serve written submissions or IN THE ALTERNATIVE the 1st Respondent's written submissions dated 25th May 2021 and filed on the same date be deemed as duly filed.

7) THAT the costs of this Application be provided for.

3. The said application is supported by an affidavit sworn on 26th May 2021 by Nicholas Weru, the 1st Respondent's advocate. I will reproduce the grounds for the said application verbatim which are as follows:

- a. *The Court issued directions on the 1st day of July 2020 directing parties to file written submissions within twenty one days and fixing the matter for hearing on 29th September 2020.*
- b. *The 1st Respondent had in the meantime filed an Appeal to the Court of Appeal on 15th October 2019 in Civil Appeal No. 500 of 2019 against the Ruling and Orders of Lady Justice Nyamweya dated 28th June 2019 and delivered on 1st July 2019, which appeal is pending determination and had also filed a Notice of Motion under Rule 5 (2)(b) of the Court of Appeal rules seeking a stay of proceedings pending hearing of the appeal.*
- c. *There was delay in the Court of Appeal in hearing the said application and appeal and this caused an unintentional lapse on the 1st Respondent part in the form of a delay in filing written submissions on this Judicial Review.*
- d. *As a result thereof, the Applicant herein filed a Notice of Motion dated 28th September 2020 seeking an extension of time within which to file written submissions on this matter on 29th September 2020.*
- e. *The application for extension of time has to date not been dispensed with as the Court has never issued any directions on the same.*
- f. *The Court of Appeal delivered its ruling on the Notice of Motion application under Rule 5 (2) (b) of the Courts rules in which it recognized that the issues raised on jurisdiction were before it for resolution in Appeal No. 500 of 2019.*
- g. *This Honorable ought to await determination of the issue of jurisdiction by the Court of Appeal for the purpose of orderly dispensation of Justice as was held by the Supreme Court of Kenya in **Law Society of Kenya v Attorney General & Another [2019] eKLR***
- h. *It has come to the 1st Respondent's attention that this matter was mentioned on 18th May 2021 on which date the Court apparently fixed the matter for Judgement on 29th June 2021.*
- i. *The 1st Respondent was not aware of the said date as we were not served by any of the other parties and there is no Affidavit of Service on the Judiciary e-filing platform evidencing any service.*
- j. *It appears from the Judiciary e-filing platform that the matter has been mentioned on numerous occasions without any notice to the 1st Respondent and this has seriously prejudiced our clients right to justice.*
- k. *The 1st Respondent is desirous of defending this suit and has prepared comprehensive written submissions for the Courts consideration.*
- l. *The Intended Submissions raise substantial issues of determination and it would be highly prejudicial to the 1st Respondent should the Court proceed to determine this suit without the benefit of our submissions.*
- m. *The Ex-parte Applicant would suffer no prejudice if the Application is allowed as a judgement is yet to be delivered in the matter.*
- n. *This application has been filed without delay.*
- o. *It is in the interest of justice that this Application be allowed*

4. It is evident from the above grounds that the 1st Respondent does not seem to be aware of the proceedings, rulings and directions given herein since it filed its application dated 28th September 2020, which application was filed under certificate of urgency and heard *ex parte*, and allowed in a ruling delivered thereon on 29th September 2020. It is also notable that the Court of Appeal declined to stay the instant proceedings in its ruling delivered on 19th March 2021 in Nairobi Civil Appeal No. 500 of 2019. A copy of the said ruling was annexed by the 1st Respondent to its supporting affidavit.

5. Given that the 1st Respondent was not aware of the previous directions by this Court, it is my view that its application dated 26th May 2021 needs to be canvassed *inter partes* by the parties before judgment is delivered herein.

6. In the premises, I hereby direct and order as follows:

I. The judgment dated of 29th June 2021 is hereby vacated.

II. The 1st Respondent shall serve the *ex parte* Applicant with: (i) the Notice of Motion application dated 26th May 2021 together with Skeletal submissions on the outstanding prayers therein; (ii) its submissions dated 25th May 2021

on the substantive Notice of Motion; (iii) a copy of this ruling; and (iv) a hearing notice, within ten (10) days of today's date.

III. The *ex parte* Applicant is granted leave to file and serve their reply submissions on the outstanding prayers in the 1st Respondent's Notice of Motion application dated 26th May 2021 within ten (10) days of service by the 1st Respondent.

IV. The outstanding prayers in the 1st Respondent's Notice of Motion application dated 26th May 2021 shall be heard virtually by videolink on 29th June 2021 at 3 pm, and the Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for a virtual hearing on 29th June 2021 at 3 pm, and shall avail to the parties the electronic link for the hearing.

V. 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 1st Respondent's Notice of Motion application dated 26th May 2021 on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

VI. 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.

VII. 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.

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

IX. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the 1st Respondent by electronic mail by close of business on Thursday, 4th June 2021, and shall use the 1st Respondent proper email address as indicated in its Notice of Motion application dated 26th May 2021.

X. The Deputy Registrar of the Judicial Review Division shall also send to the 1st Respondent using its proper email address, copies of the ruling delivered herein on 29th September 2020, and the directions given thereafter on 26th January 2021 and 27th April 2021, by close of business on Thursday, 4th June 2021,

XI. Parties shall be at liberty to apply.

7. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF MAY 2021

P. NYAMWEYA

JUDGE