



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 86 OF 2020

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL SECRETARY, STATE

DEPARTMENT OF LIVESTOCK.....1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF

AGRICULTURE, LIVESTOCK, FISHERIES AND

CO-OPERATIVES.....2ND RESPONDENT

THE KENYA VETERINARY BOARD.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

EX PARTE APPLICANTS:

1. DR. ELIZABETH OUKO

2. MR. JOHN NGIGI NYUMU

3. DR. BENSON MUTISYA MUTHUI

4. MR. FRANCIS MUTHURI MUTUA

RULING

The Application

1. The *ex parte* Applicants, Dr. Elizabeth Ouko, Mr. John Ngigi Nyumu, Dr. Benson Mutisya Muthui and Mr. Francis Muthuri Mutua (hereinafter referred to as “the 1st, 2nd, 3rd, and 4th *ex parte* Applicants respectively”), are registered members of the Kenya Veterinary Board, which is the 3rd Respondent herein. They are aggrieved by the appointments made to the Veterinary Medicine Directorate by the Cabinet Secretary of the Ministry of Agriculture, Livestock, Fisheries and Co-operatives, who they have sued as the 2nd Respondent. The said appointments were published in Gazette Notice No. 3243 dated 24th April 2020.

2. The *ex parte* Applicants claim that the said appointments were made in disregard of the law and the recommendations made by the 3rd Respondent, as required by paragraph 8(1)(f) and (g) of the Veterinary Surgeons and Veterinary Paraprofessionals Regulations of 2015.

3. The 1st, 2nd, 3rd, and 4th *ex parte* Applicants consequently filed an application by way of a Chamber Summons dated 28th April 2020, seeking orders that the application be certified urgent, and for leave to apply for the following orders:

a. An order of certiorari quashing the Gazette Notice No. 3243 dated 24th April 2020 purporting to appoint Josiah Machiki Mandieka, John Wilberforce Muchibi, James Muchini Mbaria and Douglas Gitonga as Council Members of the Veterinary Medicine Directorate.

b. An order of mandamus compelling the 2nd Respondent to gazette and appoint persons as was recommended by the 3rd Respondent to the said Veterinary Medicine Directorate.

4. The *ex parte* Applicants further sought orders that the leave so granted do operate as a stay of the implementation of Gazette Notice No. 3243 dated 24th April 2020 purporting to appoint Josiah Machiki Mandieka, John Wilberforce Muchibi, James Muchini Mbaria and Douglas Gitonga as Council Members of the Veterinary Medicine Directorate.

5. The grounds for the application are stated in the *ex parte* Applicant's Statutory Statement dated 28th April 2020, and a verifying affidavit sworn on the same date by the 1st *ex parte* Applicant. The *ex parte* Applicants also annexed copies of the Gazette Notice No. 3243 dated 24th April 2020, the Veterinary Surgeons and Veterinary Paraprofessionals Regulations of 2015, and of correspondence on the nominations for appointment made by the 3rd Respondent as their evidence.

The Determination

6. Upon carefully consideration of the application dated 28th April 2020 and the reasons offered in support of the urgency, I am satisfied that the 1st, 2nd, 3rd, and 4th *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 assumption of duties by the persons appointed by the 2nd Respondent to the Veterinary Medicine Directorate by Gazette Notice No. 3243 dated 24th April 2020.

7. On the orders sought for leave to commence judicial review proceedings, the applicable law on leave 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 reason for the leave was 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** as follows:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”.

8. It is 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 Applicants have provided evidence of the impugned appointments made by the 2nd Respondent by Gazette Notice No. 3243 dated 24th April 2020, and have also averred to the grounds and reasons why they consider the Respondent's decision to be illegal and *ultra vires*. They have also identified the law they claim is applicable and that has been breached by the 2nd Respondent in making the said appointments.

9. To this extent I find that the 1st, 2nd, 3rd, and 4th *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.

10. On the question of whether the said leave can operate as a stay of the impugned decision, 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.”

11. 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.

12. 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. Similarly, Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** expressed himself on this factor as follows:

“... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that

has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act....”

13. 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.”

14. A similar position has been taken by Odunga J. in **Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR** and in **James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR**, where the learned judge held that it is only where the decision in question is complete that the Court cannot stay the same. However, where what ought to be stayed is a continuing process, the same may be stayed at any stage of the proceedings.

15. I am in agreement with the above-cited decisions. 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.

16. In the present application the appointments made by the 2nd Respondent will require the assumption of office by the appointees and performance of their duties going forward. The appointments are thus of a continuing nature and are thus amenable to stay. In addition, there is need to prevent the implementation of the said appointments until the legality of the 2nd Respondent’s decision is established. The stay orders sought by the Applicants are therefore merited.

17. In this regard, I note that the orders sought by the *ex parte* Applicants will affect the persons appointed by the 2nd Respondent to the Veterinary Medicine Directorate by Gazette Notice No. 3243 dated 24th April 2020, yet the said persons have not been joined as parties in these proceedings. Being so directly affected, they are necessary parties in this suit within the meaning of Order 53 Rule 3 (2) and (4) of the Civil Procedure Rules, and will therefore require to be heard on the *ex parte* Applicants’ application.

The Orders

18. In light of the foregoing observations and findings, the 1st, 2nd, 3rd, and 4th *ex parte* Applicants’ Chamber Summons dated 28th April 2020 is found to be merited. I accordingly grant the following orders:

I. The 1st, 2nd, 3rd, and 4th *ex parte* Applicants’ Chamber Summons application dated 28th April 2020 be and is hereby certified as urgent, and that the same is hereby admitted for hearing *ex parte* and on a priority basis.

II. The 1st, 2nd, 3rd, and 4th *ex parte* Applicants are granted leave to apply for an order of Certiorari to quash Gazette Notice No. 3243 dated 24th April 2020 that appointed Josiah Machiki Mandieka, John Wilberforce Muchibi, James Muchini Mbaria and Douglas Gitonga as Council Members of the Veterinary Medicine Directorate.

III. The 1st, 2nd, 3rd, and 4th *ex parte* Applicants are granted leave to apply for an order of mandamus compelling the 2nd Respondent to gazette and appoint persons as was recommended by the 3rd Respondent to the said Veterinary Medicine Directorate.

IV. The leave so granted by the orders hereinabove shall operate as a stay of the implementation of Gazette Notice No. 3243 dated 24th April 2020 purporting to appoint Josiah Machiki Mandieka, John Wilberforce Muchibi, James Muchini Mbaria and Douglas Gitonga as Council Members of the Veterinary Medicine Directorate, pending the hearing and determination of the substantive Notice of Motion.

V. Josiah Machiki Mandieka, John Wilberforce Muchibi, James Muchini Mbaria and Douglas Gitonga be and are hereby joined in this suit as the 1st, 2nd, 3rd, and 4th Interested Parties respectively.

VI. The costs of the Chamber Summons dated 28th April 2020 shall be in the cause.

VII. The 1st, 2nd, 3rd, and 4th *ex parte* Applicants shall file and serve all the Respondents and Interested Parties with the substantive Notice of Motion, and shall also serve all the Respondents and Interested Parties with the Chamber Summons dated 28th April 2020 and its supporting documents, a copy of this ruling, and a mention notice within fourteen (14) days from today’s date.

VIII. Upon being served with the said pleadings and documents, the Respondents and Interested Parties shall be required to file their responses to the substantive Notice of Motion within fourteen (14) days from the date of service.

IX. This matter shall be mentioned on 3rd June 2020 for further directions

X. 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, 2nd, 3rd, and 4th *ex parte* Applicants' substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties. In this respect, all the parties shall file their pleadings, applications and written submissions electronically, by sending them to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com, and shall also avail the electronic copies in word format.

XI. The electronic copies of pleadings and documents sent by the parties shall be clearly and correctly titled to indicate the J.R Case Number, the name of the Party sending it (that is whether the *Ex Parte* Applicant, Respondent or Interested Party), and the nature of the pleading or document.

XII. 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.

XIII. The parties shall also be required to send the respective affidavits of service by way of electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XIV. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling and the extracted orders to the 1st, 2nd, 3rd, and 4th Applicants by electronic mail by close of business on Thursday, 30th April 2020.

XV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 3rd June 2020, and bring it to the attention of a Judge in the Division on that date for directions.

XVI. Parties shall be at liberty to apply.

19. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF APRIL 2020

P. NYAMWEYA

JUDGE