



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 114 OF 2020

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE
JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND PROHIBITION**

BETWEEN

OM PARKASH NAGPAL.....1ST APPLICANT
FACKSON WAINAINA KAGWE.....2ND APPLICANT
PRAVIN KUMAR BOWRY3RD APPLICANT
RAUTTA ATHIAMBO.....4TH APPLICANT
CHARLES WAWERU GATONYE5TH APPLICANT
STEPHEN KALONZO MUSYOKA.....6TH APPLICANT
FREDRICK NGATIA.....7TH APPLICANT
MARTHA WANGARI KARUA.....8TH APPLICANT
PHILIP MURGOR.....9TH APPLICANT
ALBERT MUMMA10TH APPLICANT
BEAUTTAH ALUKHAVA SIGANGA11TH APPLICANT
KIRAGU KIMANI.....12TH APPLICANT
JUDY THONGORI13TH APPLICANT
TAIB ALI TAIB BAJABIR.....14TH APPLICANT
ZEHREBANU JANMOHAMED15TH APPLICANT
WILFRED NDERITU16TH APPLICANT
JOHN M. OHAGA.....17TH APPLICANT
KIOKO KILUKUMI.....18TH APPLICANT

PATRICIA MANDE NYAUNDI19TH APPLICANT

ABDIKADIR HUSSEIN MOHAMMED.....20TH APPLICANT

PAUL OTIENDE AMOLLO21ST APPLICANT

JOHN MUGWIMI CHIGITI.....22ND APPLICANT

VERSUS

LAW SOCIETY OF KENYARESPONDENT

RULING

The Application

1. The twenty-two Applicants herein are advocates of the High Court of Kenya, and they are aggrieved by a decision made by the Law Society of Kenya, a statutory body established under the Law Society of Kenya Act, and which is sued as the Respondent herein. The impugned decision made by the Respondent is in a letter dated 13th May 2020, which it sent out to its members, stating that its Council held a meeting on 11th May 2020, where they resolved that the decision by the Committee on Senior Counsel made on 26th August 2019 recommending the conferment of the rank and dignity of Senior Counsel to twenty-four (24) advocates be set aside, and that the said conferment was therefore revoked. The Applicants were among those recommended for conferment of the rank of Senior Counsel.

2. The said Applicants have consequently moved this Court by way of a Chamber Summons application dated 26th May 2020, which is brought under a Certificate of Urgency in which the Applicants request that their application be heard urgently and *ex-parte* on a priority basis. The Applicants are seeking the following orders in the said application:

1. **“THAT leave be and is hereby granted to the Applicants to apply for an Order of Certiorari to remove into this Court and quash the decision of the Law Society of Kenya made on 11th May 2020 and contained in a letter dated 13th May 2020 addressed to its membership.**

2. **THAT leave be and is hereby granted to the Applicants to apply for an Order of Prohibition to prohibit the Respondent from acting further upon its decision of 11th May 2020 contained in the letter dated 13th May 2020 addressed to its membership.**

3. **THAT the grant of leave herein do operate as stay of the decision of the Respondent made on 11th May 2020 and contained in the letter dated 13th May 2020 addressed to its membership.**

4. **THAT the costs of this application be provided for.”**

3. The grounds for the application are stated in the Applicants’ statutory statement dated 26th May 2020, and a verifying affidavit sworn on the same date by Philip Murgor, the 9th Applicant herein. In summary, the Applicants are challenging the jurisdiction and/or authority of the Law Society of Kenya to revoke decision of the Committee on Senior Counsel made on 26th August 2019 recommending the conferment of the rank and dignity of Senior Counsel upon them, and the legality of the said decision.

4. The Applicants allege in this respect that the Respondent or any of its organs lacks the jurisdiction to revoke the decision of the Committee on Senior Counsel decision made on 26th August 2019 under the Advocates (Senior Counsel Conferment and Privilege) Rules 2011. Further, that the Respondent’s decision was made in violation of the rule of *sub judice*, as the subject matter of the decision was the subject of litigation in **Judicial Review Miscellaneous Application No. 300 of 2019- Donald B. Kipkorir v Law Society of Kenya & Others**, which was pending for hearing and determination. Lastly, that the impugned decision did not comply with the provisions of Article 47 of the Constitution and the Fair Administrative Action Act.

5. The Applicants annexed copies of the impugned letter and decision by the Respondent dated 13th May 2020, of notices published by the Respondent in January 2018 and February 2019 inviting applications for consideration for conferment of the rank of Senior Counsel, and of the pleadings filed and directions given in **Judicial Review Miscellaneous Application No. 300 of 2019 - Donald B. Kipkorir vs Law Society of Kenya and Others**.

The Determination

6. I have considered the application herein dated 26th May 2020 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 and should be heard on a priority basis. This for the reason that there are additional actions planned to be undertaken by the Respondent in the implementation of the impugned decision. As regards the request by the Applicants to proceed *ex parte*, Order 53 Rule 1 (1) and (2) of the Civil Procedure Rules provides the Court with such discretion as follows:

“(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been

granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

7. I am in this respect satisfied that I can proceed *ex parte* on the basis of the pleadings and evidence placed before me by the Applicants.

8. On the orders sought by the Applicants for leave to commence judicial review proceedings, *Order 53 Rule 1(1)* of the Civil Procedure Rules which is cited hereinabove, provides that no application for judicial review orders should be made unless leave of the court is 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.

9. 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 Applicants have brought evidence of the impugned decision made by the Respondent, they have made averments as to the grounds and reasons why they consider the Respondent's decision to be illegal and *ultra vires*, a summary of which is reproduced in the foregoing, and have also cited the legal provisions relied upon.

10. To this extent I find that the Applicants have met the threshold of an arguable case, and are therefore entitled to the leave sought to commence judicial review proceedings against the Respondent.

11. 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.”

12. 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.

13. 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.**

14. In the present application, after perusal of the Respondent's impugned letter dated 13th May 2020, it is evident that the intended revocation of the conferment of Senior counsel to the Applicants is already completed. The Respondent in its decision also recommends certain actions to be taken pursuant to the said revocation with regards to the Applicants' applications for the Senior Counsel rank, namely, that the said applications shall be considered together with those made in 2020, and that there should be proposals made on changes to the applicable rules in this regard.

15. To this extent therefore, the implementation of the Respondent's impugned decision is ongoing, and the said decision is thus of a continuing nature and is amenable to stay. Lastly, it would be prudent that the current *status quo* be maintained pending confirmation of the legality or otherwise of the Respondent's action to revoke the conferment of Senior Counsel status to the Applicants. The stay orders sought by the Applicants are accordingly deserved.

The Orders

16. In light of the foregoing observations and findings, the Applicants' Chamber Summons dated 26th May 2020 is found to be merited. I accordingly grant the following orders:

I. The Applicants' Chamber Summons application dated 26th May 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 Applicants are granted leave to apply for an order of Certiorari to remove into this Court and quash the decision of the Law Society of Kenya made on 11th May 2020 and contained in a letter dated 13th May 2020 addressed to its membership.

III. The Applicants are granted leave to apply for an order of Prohibition to prohibit the Respondent from acting further

upon its decision of 11th May 2020 contained in the letter dated 13th May 2020 addressed to its membership.

IV. The leave so granted herein to the Applicants to institute judicial review proceedings shall operate as a stay of the implementation of the Respondent's decision to revoke the recommendations of the Committee on Senior Counsel made on 26th August 2019 to confer the rank and dignity of Senior Counsel to the Applicants, whether in the manner proposed in the decision made on 11th May 2020 and contained in the letter dated 13th May 2020 addressed to its membership, or in any other manner, pending the hearing and determination of the Applicants' substantive Notice of Motion or until further orders of this Court.

V. The costs of the Chamber Summons dated 26th May 2020 shall be in the cause.

VI. The Applicants shall file and serve the Respondent with the substantive Notice of Motion within fourteen (14) days of today's date.

VII. The Applicants shall also serve the Respondent with the Chamber Summons dated 26th May 2020 and its supporting documents, a copy of this ruling, and a mention notice, within fourteen (14) days of today's date.

VIII. Upon being served with the said pleadings and documents, the Respondent shall be required to file and serve its response to the Applicants' substantive Notice of Motion within fourteen (14) days from the date of service.

IX. This matter shall be mentioned on 6th July 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 Applicants' substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

XI. In this respect, all the parties shall file and avail their pleadings, applications and written submissions electronically, by sending them by electronic mail 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.

XII. 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 description of the party sending it (that is whether the *Ex Parte* Applicant, Respondent or Interested Party), and the nature of the pleading or document.

XIII. 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.

XIV. 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.

XV. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling and the extracted orders to the Applicants by electronic mail by close of business on Friday, 29th May 2020.

XVI. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 6th July 2020, and bring it to the attention of a Judge in the Division on that date for directions.

XVII. Parties shall be at liberty to apply.

17. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF MAY 2020

P. NYAMWEYA

JUDGE