



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 126 OF 2020**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE**

**JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI**

**BETWEEN**

**REPUBLIC..... APPLICANT**

**VERSUS**

**ROYAL NAIROBI GOLF CLUB.....RESPONDENT**

**EX PARTE APPLICANTS:**

**OOKO ERICK OBURA**

**RICHARD CYOI WAFULA**

**RULING**

**The Application**

1. The *ex parte* Applicants herein, Ooko Erick Obura and Richard Cyoi Wafula, are members of the Royal Nairobi Golf Club, which they have sued as the Respondent herein. The *ex parte* Applicants are aggrieved by the Respondent's decision suspending them as its members, which is contained in letters dated 17<sup>th</sup> March 2020, which were sent to them by the Respondent.

2. The *ex parte* Applicants have consequently moved this Court by way of a Chamber Summons dated 8<sup>th</sup> June 2020, seeking orders that they be granted leave to apply for an order of certiorari to remove to the High Court and quash the decisions of the board meeting of the Royal Nairobi Golf Club suspending the *ex parte* Applicants indefinitely, vide the Respondent's letters to the *ex parte* Applicants dated 17<sup>th</sup> March 2020. They also seek an order that the grant of leave operates as a stay of the decisions, and that the costs of the application be in the cause.

3. The grounds for the application are stated in the *ex parte* Applicants' statutory statement dated 8<sup>th</sup> June 2020, and verifying affidavits sworn on the same date by the *ex parte* Applicants. In summary, the *ex parte* Applicants allege that the Respondent's decision was *ultra vires*, made without due process, and in contravention of the applicable procedure and rules of natural justice. The *ex parte* Applicant annexed copies of the Respondent's decision dated 17<sup>th</sup> March 2020, and of a letter by email dated 19<sup>th</sup> March 2020, denying them access to the Respondent's facilities.

**The Determination**

4. I have considered the application dated 8<sup>th</sup> June 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 in light of the *ex parte* Applicants' denial of access to the Respondent's facilities.

5. 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.

6. 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* Applicants have brought evidence of the impugned decision made by the Respondent, and have averred to the grounds and reasons why it considers the Respondent's decision to be illegal.

7. To this extent I find that the *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 Respondent.

8. 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.”**

9. 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.

10. It has in this regard been held that where 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.**

11. In the present application, a perusal of the Respondent's letters dated 17<sup>th</sup> March 2020 shows that the suspension of the *ex parte* Applicants was to take effect immediately, pending finalization of investigations by the Respondent. The said suspension and decision is therefore not amenable for stay, as it has been fully implemented.

#### **The Orders**

12. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 8<sup>th</sup> June 2020 is found to be merited to the extent of the following orders:

**i. The *ex parte* Applicant's Chamber Summons application dated 8<sup>th</sup> June 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 *ex parte* Applicants are granted leave to apply for an order of Certiorari to remove in to this Court and quash the decisions of the Board meeting of the Royal Nairobi Golf Club suspending the *ex parte* Applicants from the club indefinitely vide the Respondent's letters to the *ex parte* Applicants dated 17<sup>th</sup> March 2020.**

**iii. Prayer 2 of the *ex parte* Applicants' Chamber Summons dated 8<sup>th</sup> June 2020 that the leave so granted operates of a stay of the said decisions is hereby denied.**

**iv. The costs of the Chamber Summons dated 8<sup>th</sup> June 2020 shall be in the cause.**

**v. The *ex parte* Applicant shall file and serve the Respondent with the substantive Notice of Motion, and shall also serve the Respondent with the Chamber Summons dated 8<sup>th</sup> June 2020 and its supporting documents, a copy of this ruling, and a mention notice, within fourteen (14) days from today's date.**

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

**vii. This matter shall be mentioned on 22<sup>nd</sup> July 2020 for further directions.**

**viii. 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 *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.**

**ix. 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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com), and shall also avail the electronic copies in word format.**

x. 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.

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

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

xiii. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicants by electronic mail by close of business on Tuesday, 16<sup>th</sup> June 2020.

xiv. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 22<sup>nd</sup> July 2020, and bring it to the attention of a Judge in the Division on that date for directions.

xv. Parties shall be at liberty to apply.

13. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 15<sup>TH</sup> DAY OF JUNE 2020

P. NYAMWEYA

JUDGE