



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E0045 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PAUL KIHARA KARIUKI ATTORNEY GENERAL.....1ST RESPONDENT

FRED MATIANGI, CS INTERIOR AND

COORDINATION ONATIONAL GOVERNMENT.....2ND RESPONDENT

JOSEPH KINYUA, SECRETARY TO CABINET.....3RD RESPONDENT

EX PARTE APPLICANT: LAW SOCIETY OF KENYA

RULING

The Application

1. The *ex parte* Applicant, the Law Society of Kenya, is aggrieved by a directive issued on 7th July 2020 by the National Development Implementation and Communication Cabinet Committee, of which the Respondents are members, and which requires Ministries, State Departments and State Agencies to:

- (a) withdraw court cases filed against any other state agency within fourteen (14) days;
- (b) not to contract external counsel without written approval of the Attorney-General; and
- (c) terminate within twenty-one (21) days engagements with all external advocates who had been contracted without the express and prior grant of the concurrence of the Attorney General.

2. The *ex parte* Applicant has consequently filed an application by way of a Chamber Summons application dated 21st July 2020, seeking the following orders:

1. **The application be, and is, certified urgent for *ex parte* hearing in the first instance.**
2. **The Law Society of Kenya be and is granted leave to apply for judicial review orders of:**
 - (a) **Prohibition restraining the Respondents, their servants and agents from executing the National Development Implementation and Communication Cabinet Committee (NDICCC)'s directives (vii), (viii) and (ix) contained in Part A(1) of the Extract of Resolutions NDICCC 21 (2020) dated 8th July, 2020.**
 - (b) **Certiorari to bring to this court and to quash the National Development Implementation and Communication Cabinet Committee (NDICCC)'s directives (vii), (viii) and (ix) of 8th July 2020 contained in Part A(1) of the Extract of Resolutions NDICCC 21 (2020) dated 8th July, 2020.**

3. The leave so granted does operate as a stay—restraining implementation or further implementation by any person—of the National Development Implementation and Communication Cabinet Committee (NDICCC) directives (vii), (viii) and (ix) contained in Part A(1) of the Extract of Resolutions NDICCC 21 (2020) dated 8th July, 2020

3. The grounds for the application are detailed in the *ex parte* Applicant’s statutory statement dated 21st July 2020, and a verifying affidavit deposed to on the same date by Mercy Wambua, the *ex parte* Applicant’s Chief Executive Officer. In summary, the Applicant alleges that the impugned directives are contrary to a prohibition order by this court; discriminatory; unreasonable; illegal, and procedurally unfair.

4. The *ex parte* Applicant annexed copies of an extract of the impugned directive dated 8th July 2020, and circulars issued by the Cabinet Secretary to the Ministry of Education on 14th July 2020, and by the Principal Secretary Ministry of Water, Sanitation and Irrigation dated 16th July 2020, implementing the said directives as supporting evidence.

The Determination

4. I have considered the application dated 21st July 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. This is for the reason that there are deadlines that have been set by the Respondents for implementation of the impugned directives.

2. On the orders sought by the *ex parte* Applicant 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 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.

5. 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.

6. In the present application, the *ex parte* Applicant has provided evidence of the directive issued by the Respondents, and averred as the reasons why the said directives are unlawful and the legal provisions, including Articles of the Constitution and judicial decisions that are alleged to have been breached. 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.

7. 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.”

8. The purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review, and several principles apply in this regard, as elaborated in **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127, 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.**

9. I am however aware in this regard that a similar case has been filed by a branch of the *ex parte* Applicant, namely **Law Society of Kenya-Nairobi Branch vs The Attorney General, Nairobi High Court Judicial Review Application No. E010 of 2020**, in which similar orders are being sought. A ruling was delivered therein by Hon. Mr. Justice Mativo on 20th July 2020, in which stay orders were granted on the following terms:

a. That pending the hearing and determination of the substantive application, the leave herein granted shall operate as stay of the implementation and or execution of the impugned decision and or resolutions of the National Development and Communication Cabinet Committee dated 8th July 2020 signed and or under the hand of Mr. Joseph Kinyua, Head of Public Service transmitted to Ministries and State Departments for action as a decision of the Cabinet directing them:-

i. Not to contract external counsel without the written approval of the Attorney General and

ii. To terminate within 21 days from the date hereof engagements with all external advocates who had been contracted without the express and prior grant of the concurrence of the Attorney General.

b. That for avoidance of any doubt, the order of stay herein above granted is directed to the accounting officers and Cabinet Secretaries in the National Government stopping them from implementing the actions specified in paragraph 4 of the Chamber Summons dated 20th July 2020 pending the hearing and determination of the substantive application.”

10. The stay orders sought by the *ex parte* Applicants while merited, may be superfluous in the circumstances, and also present a risk of this Court giving conflicting stay orders over the same decision. In addition, to save on judicial time and resources, it is best that this suit is heard together with **Law Society of Kenya-Nairobi Branch vs The Attorney General, Nairobi High Court Judicial Review Application No.**

E010 of 2020, and the parties herein will therefore have an opportunity to address any issues relating to review of the stay orders.

The Orders

11. In light of the foregoing observations and findings, the *ex parte* Applicant's Chamber Summons dated 21st July 2020 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicant's Chamber Summons application dated 21st July 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* Applicant is granted leave to apply for judicial review orders of Prohibition restraining the Respondents, their servants and agents from executing the National Development Implementation and Communication Cabinet Committee (NDICCC)'s directives (vii), (viii) and (ix) contained in Part A(1) of the Extract of Resolutions NDICCC 21 (2020) dated 8th July, 2020.

III. The *ex parte* Applicant is granted leave to apply for judicial review orders of Certiorari to bring to this court and to quash the National Development Implementation and Communication Cabinet Committee (NDICCC)'s directives (vii), (viii) and (ix) of 8th July 2020 contained in Part A(1) of the Extract of Resolutions NDICCC 21 (2020) dated 8th July, 2020.

IV. The prayer that the leave so granted do operate as a stay restraining implementation or further implementation by any person of the National Development Implementation and Communication Cabinet Committee (NDICCC) directives is declined.

V. The costs of the Chamber Summons application dated 21st July 2020 shall be in the cause.

VI. The *ex parte* Applicant shall file and serve the Respondents with the substantive Notice of Motion, and shall also serve the Respondents with the Chamber Summons application dated 21st July 2020 and its supporting documents, a copy of this ruling, and a hearing notice, within fourteen (14) days from today's date.

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

VIII. The *ex parte* Applicant is granted leave to file a supplementary affidavit if need be, together with submissions on its substantive Notice of Motion within fourteen (14) days of service of the Respondents' responses or upon default thereof.

IX. The Respondents are granted corresponding leave to file and serve their submissions within fourteen (14) days of service of the *ex parte* Applicant's submissions.

X. A virtual hearing to confirm compliance and to highlight submissions shall be held before **Hon. Mr. Justice Mativo** on **6th October 2020 at 10 am** together with **Law Society of Kenya-Nairobi Branch vs The Attorney General**, Nairobi High Court Judicial Review Application No. E010 of 2020.

XI. 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 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.

XII. 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.

XIII. 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.

XIV. 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.

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

XVI. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for a virtual hearing before **Hon. Mr. Justice Mativo** on **6th October 2020 at 10 am**, and shall send an electronic link for the hearing to the *ex parte* Applicant and Respondents by close of business on 5th October 2020.

XVII. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions and the extracted orders to the *ex parte* Applicant by electronic mail by close of business on Thursday, 23rd July 2020.

XVIII. Parties shall be at liberty to apply.

12. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF JULY 2020

P. NYAMWEYA

JUDGE