



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. E052 OF 2020**

**KENYA PHARMACEUTICAL ASSOCIATION.....1<sup>ST</sup> APPLICANT**

**PATRICK ODUOR ADERA.....2<sup>ND</sup> APPLICANT**

**PETER ATANDI MOGERE.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**CHITECHI AMBOKA.....1<sup>ST</sup> RESPONDENT**

**WILLIAMSON CHUMBA.....2<sup>ND</sup> RESPONDENT**

**JOEL CHEGE.....3<sup>RD</sup> RESPONDENT**

**FREDRICK KIIO.....4<sup>TH</sup> RESPONDENT**

**RULING**

**The Application**

1. The Kenya Pharmaceutical Association 1<sup>st</sup> *ex parte* Applicant herein, is a professional association that was formed in 1970, and its membership is made up of Pharmaceutical Technologists. The 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants and 1<sup>st</sup> to 4<sup>th</sup> Respondents are Kenyan adult citizens and members of the 1<sup>st</sup> *ex parte* Applicant. The *ex parte* Applicants are aggrieved by the actions of the Respondents to convene a meeting under the banner of the “Central Council” of the 1<sup>st</sup> *ex parte* Applicant and to create a committee known as the “KPA Central Council Members Committee”.

2. The *ex parte* Applicants are also aggrieved by the decisions of the Respondents to appoint themselves as officials of the said Committee, and to undertake disciplinary proceedings against the National Executive Committee that resulted in the dismissal of the 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants from their elected positions in the 1<sup>st</sup> *ex parte* Applicant as Chairman and Secretary General respectively.

3. The *ex parte* Applicants have consequently filed an application by way of a Chamber Summons dated 6<sup>th</sup> August 2020, seeking the following orders:

**a) THAT the application be certified urgent;**

**b) THAT the Court be pleased to grant leave to the 1st, 2nd and 3rd Applicants to apply for an Order of Prohibition to prohibit the 1st, 2nd, 3rd and 4th Respondents whether by themselves, agents, nominees or any other person whatsoever, from holding themselves as, and in manner whatsoever performing the functions of the National Executive Committee and/or the Central Council Members Committee of the Kenya Pharmaceutical Association.**

**c) THAT the Court be pleased to quash the decision of the Respondents against the 2nd and 3rd Applicants dated 12th May 2020 and 8th May 2020 respectively purporting to suspend the 2nd and 3rd Applicants as the Chairman and Secretary General respectively of the 1st Applicant.**

**d) THAT the Court do declare that the Respondents constituting themselves as the Central Council of the 1st Applicant is**

illegal and without merit.

e) THAT the Court be pleased to grant leave to the 1st, 2nd and 3rd Applicants to apply for an Order of Prohibition to prohibit the 1st, 2nd, 3rd and 4th Respondents whether by themselves, agents, nominees or any other person whatsoever, from writing, publishing, broadcasting, and or dispensing any information on behalf of the Kenya Pharmaceutical Association whether through electronic media, social media or any other publication.

f) THAT the Court be pleased to grant leave to the 1st, 2nd and 3rd Applicants to apply for an Order of Prohibition to prohibit the 1st, 2nd, 3rd and 4th Respondents from assuming the office of and putting themselves across as officials of a Committee of the Kenya Pharmaceutical Association, hereinafter referred to as the Central Council Members Committee and or in any manner whatsoever interfering with the management and operations of the Kenya Pharmaceutical Association.

g) THAT the Court be pleased to grant leave to the 1st, 2nd and 3rd Applicants to apply for an Order of Prohibition to prohibit the 1st, 2nd, 3rd and 4th Respondents from presiding over any or the Central Council Meeting of the Kenya Pharmaceutical Association pending hearing and determination of this Application *inter partes*.

h) THAT the Court be pleased to grant leave to the 1st, 2nd and 3rd Applicants to apply for an Order of Prohibition to prohibit execution of any function of the Central Council Members Committee of the 1st Applicant as constituted.

i) THAT the Court be pleased to grant leave to the 1st, 2nd and 3rd Applicants to apply for an Order declaring the Central Council Members Committee as constituted an unconstitutional, illegal outfit and effectively dissolve the same.

j) THAT the grant of leave to institute judicial review proceeding do operate as a stay of enforcement, actions or such other steps by the Respondents in their alleged capacity as members of the National Executive Committee and the Central Council of the 1st Applicant.

4. The grounds for the application are stated in the *ex parte* Applicants' Statutory Statement dated 6<sup>th</sup> August 2020, and a verifying affidavit sworn on the same date by the 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants. The main ground for the application is that the Respondents' actions are illegal and are not provided for by the 1<sup>st</sup> *ex parte* Applicant's Constitution.

5. The *ex parte* Applicants annexed copies of the 1<sup>st</sup> *ex parte* Applicant's Constitution, correspondence from the Respondents on the disciplinary action against the 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants and of appointment of new officials, and an advertisement published in a local newspaper of their removal as officials of the 1<sup>st</sup> *ex parte* Applicant as their evidence.

#### **The Determination**

6. Upon careful consideration of the application dated 6<sup>th</sup> August 2020 and the reasons offered in support of the urgency, I am satisfied that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> *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 Respondent as officials of the 1<sup>st</sup> *ex parte* Applicant.

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...”**

8. It is thus 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 provided evidence of the actions undertaken by the Respondents against them and of appointing new officials of the 1<sup>st</sup> *ex parte* Applicant, and have also averred to the grounds and reasons why they consider the Respondents' decision to be illegal and *ultra vires*. They have also identified the rules they claim are applicable and that are alleged to have been breached by the Respondents.

9. To this extent I find that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> *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** opined 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 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.

16. In the present application the appointments made by the 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 Respondent's decision is established. The stay orders sought by the *ex parte* Applicants are therefore merited.

17. In this regard, I note that the orders sought by the *ex parte* Applicants will also affect the persons appointed as new officials of the eleven-member Central Council Members Committee, which also includes the Respondents, 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 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants' Chamber Summons dated 6<sup>th</sup> August 2020 is found to be merited. I accordingly grant the following orders:

**I. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants' Chamber Summons application dated 6<sup>th</sup> August 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 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> *ex parte* Applicants are granted leave to apply for an order of Prohibition to prohibit the 1st, 2nd, 3rd and 4th Respondents whether by themselves, agents, nominees or any other person whatsoever, from holding themselves as, and in manner whatsoever performing the functions of the National Executive Committee and/or the Central Council Members Committee of the Kenya Pharmaceutical Association.**

**III. The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> *ex parte* Applicants are granted leave to apply for an order of Certiorari to quash the decision of the Respondents against the 2nd and 3rd Applicants dated 12th May 2020 and 8th May 2020 respectively purporting to suspend the 2nd and 3rd *ex parte* Applicants as the Chairman and Secretary General respectively of the 1st *ex parte* Applicant.**

**IV. The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> *ex parte* Applicants are granted leave to apply for a declaration that the Respondents constituting themselves as the Central Council of the 1st *ex parte* Applicant is illegal and without merit.**

**V. The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> *ex parte* Applicants are granted leave to apply for an order of Prohibition to prohibit the 1st, 2nd, 3rd and 4th Respondents whether by themselves, agents, nominees or any other person whatsoever, from writing, publishing, broadcasting, and or dispensing any information on behalf of the Kenya Pharmaceutical Association whether through**

electronic media, social media or any other publication.

VI. The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> *ex parte* Applicants are granted leave to apply for an order of Prohibition to prohibit the 1st, 2nd, and 3rd Respondents from assuming the office of and putting themselves across as officials of a Committee of the Kenya Pharmaceutical Association, hereinafter referred to as the Central Council Members Committee and or in any manner whatsoever interfering with the management and operations of the Kenya Pharmaceutical Association.

VII. The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> *ex parte* Applicants are granted leave to apply for an order of Prohibition to prohibit the 1st, 2nd, 3rd and 4th Respondents from presiding over any or the Central Council Meeting of the Kenya Pharmaceutical Association pending hearing and determination of this Application inter-partes.

VIII. The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> *ex parte* Applicants are granted leave to apply for an order of Prohibition to prohibit execution of any function of the Central Council Members Committee of the 1st *ex parte* Applicant as constituted.

IX. The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> *ex parte* Applicants are granted leave to apply for a Declaration the Central Council Members Committee as constituted an unconstitutional, illegal outfit and effectively dissolve the same.

X. The leave so granted by the orders hereinabove shall operate as a stay of the implementation of the Respondents' decisions and actions in their capacity as members of the National Executive Committee and of the Central Council of the 1st *ex parte* Applicant, pending the hearing and determination of the substantive Notice of Motion.

XI. The remaining seven members of the Central Council Members Committee are hereby joined in this suit as the 1<sup>st</sup> to 7<sup>th</sup> Interested Parties respectively.

XII. The costs of the Chamber Summons dated 6<sup>th</sup> August 2020 shall be in the cause.

XIII. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> *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 6<sup>th</sup> August 2020 and its supporting documents, a copy of this ruling, and a mention notice within fourteen (14) days from today's date.

XIV. 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.

XV. The *ex parte* Applicants' substantive Notice of Motion shall be mentioned on 6<sup>th</sup> October 2020 for further directions.

XVI. 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.

XVII. 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](mailto:judicialreview48@gmail.com) and [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XVIII. 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.

XIX. 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).

XX. The parties shall also be required to file and 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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XXI. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 6<sup>th</sup> October 2020

XXII. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the *ex parte* Applicants by electronic mail by close of business on Thursday, 20<sup>th</sup> August 2020.

XXIII. Parties shall be at liberty to apply.

**DATED AND SIGNED AT NAIROBI THIS 17<sup>th</sup> DAY OF AUGUST 2020**

**P. NYAMWEYA**

**JUDGE**