



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E1103 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE LAW SOCIETY OF KENYA.....1ST RESPONDENT

DISCIPLINARY TRIBUNAL.....2ND RESPONDENT

AND

MARIANNE JEBET KITANY.....INTERESTED PARTY

EX-PARTE.....NEDDIE EVE AKELLO

RULING

The Application

1. Neddie Eve Akello, the *ex parte* Applicant herein, is an Advocate of the High Court of Kenya, and is aggrieved by the decisions of the Law Society of Kenya and the said Society's Disciplinary Tribunal, the 1st and 2nd Respondents herein, that resulted in the issue of a Notice dated 24th August 2020 for the *ex parte* Applicant to appear before the 2nd Respondent on the 21st September 2020 in respect to Disciplinary Tribunal Cause Number 188 of 2020, for purposes of taking plea to a complaint made by the Interested Party herein.

2. The *ex parte* Applicant has consequently moved this Court by way of a Chamber Summons application dated 14th September 2020, in which she is seeking the following orders:

1. **THAT** this application certified urgent and heard *ex-parte* in the first instance.

2. **THAT** the Applicant be granted leave to apply for an Order of *certiorari* to remove into the High Court and quash the entire decision of the 1st and 2nd Respondents' communicated vide letter dated the 24th August 2020 notifying the *ex-parte* Applicant that Plea will be taken before the Disciplinary Tribunal in Cause No. 188 of 2020 and requiring the *ex-parte* Applicant to attend, together with all such proceedings subsequent or related.

3. **THAT** the Applicant be granted leave to apply for an Order of *certiorari* to remove into the High Court and quash the entire decision of the 1st Respondent to refer the complaint by the Interested Party to the 2nd Respondent without according the *ex-parte* Applicant an opportunity to respond to the complaint as lodged by the Interested Party culminating in the decision of the 2nd Respondent contained in the aforementioned Notice communicated vide letter dated the 24th August 2020 Notifying the *ex-parte* Applicant that Plea will be taken before the Disciplinary Tribunal in Cause No. 188 of 2020 and requiring the *ex-parte* Applicant to attend together with all such proceedings subsequent or related.

4. **THAT** the Applicant be granted leave to apply for an Order of Prohibition to prohibit the Respondents from proceeding any further in acting upon the decision of the 1st Respondent dated 24th August 2020 and in taking any further step in the

proceedings in Disciplinary Cause no. 188 of 2020.

5. **THAT** the grant of leave be ordered to operate as stay of the commencement and continued hearing of the Disciplinary Tribunal Cause Number 188 of 2020 against the *ex-parte* Applicant pending the determination of the intended substantive Judicial Review once filed.

6. **THAT** the costs of this Application be on the cause.

3. The grounds for the application are stated in the Applicant's statutory statement dated 14th September 2020, and a verifying affidavit sworn on the same date by the *ex-parte* Applicant. In summary, the *ex parte* Applicant states that the 1st Respondent advanced in the processing of a complaint from the Interested Party before notifying the *ex-parte* Applicant of the complaint, while at the same time referring the Complaint to the 2nd Respondent for disciplinary action.

4. Therefore, that the decisions of the 1st and 2nd Respondents culminating in the 2nd Respondent's Notices to the *ex-parte* Applicant to take plea pursuant to the said complaint were arrived at in bad faith, irrationally, with open bias, without due regard to the law and the facts in question, in contravention to the law and *ultra vires* the powers donated to it by statute.

5. The *ex-parte* Applicant annexed copies of correspondences between her and the 1st Respondent regarding the complaint, and of the Notice dated 24th August 2020.

The Determination

6. I have considered the application dated 14th September 2020 and the reasons offered in support of the urgency, and I am satisfied that the Applicant has demonstrated that this matter is urgent, in light of the schedules plea taking by the *ex parte* Applicant before the 2nd Respondent on 21st September 2020.

7. 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 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 *ex parte* Applicant has provided evidence of the disciplinary processes against her by Respondents, and of the Respondent's Notice dated 24th August 2020. The *ex parte* Applicant has also averred to the grounds and reasons why it considers the Respondents decision to be illegal, and cited the legal provisions relied upon.

9. 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.

10. 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.”

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. 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.

13. 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, the disciplinary proceedings against the *ex parte* Applicant are yet to commence, and, there is need to preserve the current *status quo* until the legality of the Respondents' proceedings and decision is established, otherwise the *ex parte* Applicant's application in this regard may be rendered nugatory.

The Orders

15. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 14th September 2020 is found to be merited only to the extent of the following orders:

i. The *ex parte* Applicant's Chamber Summons application dated 14th September 2020 is hereby certified as urgent, and admitted for hearing *ex parte* and on a priority basis.

ii. The *ex parte* Applicant be and is hereby granted leave to apply for an order of *certiorari* to remove into the High Court and quash the entire decision of the 1st and 2nd Respondents' communicated vide letter dated the 24th August 2020 notifying the *ex-parte* Applicant that Plea will be taken before the Disciplinary Tribunal in Cause No. 188 of 2020 and requiring the *ex-parte* Applicant to attend, together with all such proceedings subsequent or related.

iii. The *ex parte* Applicant be and is hereby granted leave to apply for an order of *certiorari* to remove into the High Court and quash the entire decision of the 1st Respondent to refer the complaint by the Interested Party to the 2nd Respondent without according the *ex-parte* Applicant an opportunity to respond to the complaint as lodged by the Interested Party culminating in the decision of the 2nd Respondent contained in the aforementioned Notice communicated vide letter dated the 24th August 2020 Notifying the *ex-parte* Applicant that Plea will be taken before the Disciplinary Tribunal in Cause No. 188 of 2020 and requiring the *ex-parte* Applicant to attend together with all such proceedings subsequent or related.

iv. The *ex parte* Applicant be and is hereby granted leave to apply for an order of Prohibition to prohibit the Respondents from proceeding any further in acting upon the decision of the 1st Respondent dated 24th August 2020 and in taking any further step in the proceedings in Disciplinary Cause no. 188 of 2020.

v. The leave granted herein to institute these judicial review proceedings shall operate as a stay of the operate as a stay of the taking of plea in, and continued hearing of the Disciplinary Tribunal Cause Number 188 of 2020 against the *ex-parte* Applicant, pending the hearing and determination of the substantive Notice of Motion or further orders.

vi. The costs of the Chamber Summons dated 14th September 2020 shall be in the cause.

vii. The *ex parte* Applicant shall file and serve the Respondents and Interested Party with the substantive Notice of Motion, and shall also serve the Respondents and Interested Party with the Chamber Summons dated 14th September 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 Party 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 9th November 2020 to confirm compliance and 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 *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.

xi. 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.

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 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 with copies to asunachristine51@gmail.com.

xv. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 9th November 2020.

xvi. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the Applicant by electronic mail by close of business on Friday, 18th September 2020.

xvii. Parties shall be at liberty to apply.

16. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 18th DAY OF SEPTEMBER 2020

P. NYAMWEYA

JUDGE