



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. MISC E1101 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND MANDAMUS

BETWEEN

NELSON MWENDA PAUL.....1ST APPLICANT

FRANCIS MUTIJKU KIMITI.....2ND APPLICANT

JACKLINE KARAMBU.....3RD APPLICANT

VERSUS

NATIONAL GOVERNMENT CONSTITUENCIES

DEVELOPMENT FUND BOARD.....1ST RESPONDENT

THE SELECTION PANEL OF THE NATIONAL GOVERNMENT

CONSTITUENCIES DEVELOPMENT FUND COMMITTEE

FOR KAMUKUNJI CONSTITUENCY.....2ND RESPONDENT

RULING

The Application

1. The 1st, 2nd and 3rd Applicants herein submitted their applications for consideration by the Selection Panel of the National Government Constituencies Development Fund Committee for Kamkunji Constituency (the 2nd Respondent herein), for appointment as members of the National Government Constituencies Development Fund Committee for Kamkunji Constituency. The said Selection Panel had been constituted by the National Government Constituencies Development Fund Board, which is sued as the 1st Respondent herein.

2. The 1st, 2nd and 3rd Applicants have now moved this Court by way of a Chamber Summons application dated 11th September 2020, in which they are seeking the following orders:

1. THAT this application be certified as urgent and heard ex parte in the first instance.

2. THAT leave be granted for this application to be heard during the vacation.

3. THAT the Applicants are seeking leave to apply for an order of CERTIORARI quashing and setting aside the decision of the 2nd Respondent arising from the interviews conducted on 3rd February 2020, where they selected persons to be considered for appointment to the National Government Constituencies Development Fund Committee for Kamkunji Constituency.

4. THAT the Applicants are further seeking for leave to apply for an order of CERTIORARI to quash the selection, nomination, co-option, gazettment and appointment of members of the National Government Constituencies Development Fund Committee for Kamkunji Constituency by the Respondents as published in the Kenya Gazette vide Gazette Notice No. 3737 on 29th May 2020.

5. THAT the Applicants are also seeking leave to apply for an order of MANDAMUS compelling the 1st Respondent to constitute a proper Selection Panel for Kamkunji Constituency to conduct fresh and proper interviews of persons to be selected, nominated, co-opted, gazetted and appointed to the National Government Constituencies Development Fund Committee for Kamkunji Constituency.

6. THAT the grant of leave to apply for Order of Certiorari do operate as a stay of the performance of any functions of the members of the National Government Constituencies Development Fund Committee for Kamkunji Constituency who were gazetted on 29th May 2020 in the Kenya Gazette vol. CXXII No. 97 Gazette Notice No. 3737.

7. THAT costs of this Application be provided for.

3. The grounds for the application are stated in the Applicants' statutory statement dated 11th September 2020, and a verifying affidavit sworn on the same date by the 1st Applicant. In summary, the 1st, 2nd and 3rd Applicants are aggrieved by the process adopted by the said selection panel, and the composition and qualifications of the persons selected, nominated, co-opted and appointed to the National Government Constituencies Development Fund Committee for Kamkunji Constituency, whose names were published in the Kenya Gazette Vol. CXXII- No. 97 on 29th May 2020 vide Gazette Notice No. 3737.

4. The Applicants annexed copies of correspondence sent to the 1st Respondent on the impugned selection process, and of the impugned Gazette Notice published on 29th May 2020 in the Kenya Gazette vol. CXXII No. 97 Gazette Notice No. 3737.

The Determination

5. I have considered the application dated 11th September 2020 and the reasons offered in support of the urgency, and I am satisfied that the 1st, 2nd and 3rd Applicants have demonstrated that this matter is urgent. This for the reason that the persons who have been selected through the impugned process have since been appointed.

6. On the orders sought by the Applicants 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”.

7. 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 1st, 2nd and 3rd Applicants have provided evidence of the appointments undertaken by the Respondents. The said Applicants have also averred to the grounds and reasons why they consider the Respondents' decision to be illegal.

8. To this extent I find that the 1st, 2nd and 3rd 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.

9. 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.”

10. 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.

11. 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.

12. 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.

13. In the present application, I note that the application and interview process set to be quashed took place in February 2020, and the appointment in the impugned Kenya Gazette took place in May 2020. The impugned decision of the Respondents has therefore been implemented, as there are persons already in office and who have commenced execution of their duties as a result, and is thus not amenable to a stay.

14. In addition, it is also notable that the Applicants have not joined the persons appointed as members of the National Government Constituencies Development Fund Committee for Kamkunji Constituency by the Gazette Notice published on 29th May 2020 in the Kenya Gazette vol. CXXII No. 97 Gazette Notice No. 3737 as parties in this suit, yet the said persons are likely to be directly affected by the orders that are being sought herein.

The Orders

15. In light of the foregoing observations and findings, the 1st, 2nd and 3rd Applicants' Chamber Summons dated 11th September 2020 is found to be merited only to the extent of the following orders:

i. The 1st, 2nd and 3rd Applicants' Chamber Summons application dated 11th September 2020 is hereby certified as urgent, and admitted for hearing *ex parte* and on a priority basis.

ii. The members of the National Government Constituencies Development Fund Committee for Kamkunji Constituency appointed by the Gazette Notice published on 29th May 2020 in the Kenya Gazette vol. CXXII No. 97 Gazette Notice No. 3737 are joined as Interested Parties in this suit.

iii. The 1st, 2nd and 3rd Applicants are granted leave to apply for an order of Certiorari quashing and setting aside the decision of the 2nd Respondent arising from the interviews conducted on 3rd February 2020, where they selected persons to be considered for appointment to the National Government Constituencies Development Fund Committee for Kamkunji Constituency.

iv. The 1st, 2nd and 3rd Applicants are granted leave to apply for an order of Certiorari to quash the selection, nomination, co-option, gazettelement and appointment of members of the National Government Constituencies Development Fund Committee for Kamkunji Constituency by the Respondents as published in the Kenya Gazette vide Gazette Notice No. 3737 on 29th May 2020.

v. The 1st, 2nd and 3rd Applicants' are granted leave to apply for an order of Mandamus compelling the 1st Respondent to constitute a proper Selection Panel for Kamkunji Constituency to conduct fresh and proper interviews of persons to be selected, nominated, co-opted, gazetted and appointed to the National Government Constituencies Development Fund Committee for Kamkunji Constituency.

vi. The prayer that leave granted herein to apply for Order of Certiorari operates as a stay of the performance of any functions of the members of the National Government Constituencies Development Fund Committee for Kamkunji Constituency, who were gazetted on 29th May 2020 in Gazette vol. CXXII No. 97 Notice No. 3737 is hereby declined.

vii. The costs of the Chamber Summons dated 11th September 2020 shall be in the cause.

viii. The Applicants shall file and serve the Respondents and Interested Parties with the substantive Notice of Motion, and shall also serve the Respondents and Interested Parties with the Chamber Summons dated 11th September 2020 and its supporting documents, a copy of this ruling, and a mention notice, within fourteen (14) days from today's date.

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

x. This matter shall be mentioned on 14th October 2020 to confirm compliance and for further directions.

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 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.

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.

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.

xvi. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 14th October 2020.

xvii. 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 Thursday, 17th September 2020.

xvii. Parties shall be at liberty to apply.

16. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 16th DAY OF SEPTEMBER 2020

P. NYAMWEYA

JUDGE