



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APPLICATION NO. MISC E039 OF 2020**

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

**JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND PROHIBITION**

**BETWEEN**

**ANDRE DESIMONE.....APPLICANT**

**VERSUS**

**INSTITUTE OF CERTIFIED INVESTMENT**

**AND FINANCIAL ANALYSTS.....RESPONDENT**

**RULING**

**The Application**

1. Andre Desimone, the Applicant herein, is aggrieved by the decision by the Institute of Certified Investment and Financial Analysts (the Respondent herein), to undertake disciplinary proceedings and impose sanctions against him. The Applicant has consequently moved this Court by way of a Chamber Summons application dated 14<sup>th</sup> September 2020, in which he is seeking the following orders:

- 1. The application be certified urgent, heard ex-Parte and service be dispensed with in the first Instance.**
- 2. This Court be pleased to grant leave to the ex parte Applicant to apply for an order of Prohibition against the Respondent prohibiting them by their servants, agents and/or employees from taking any steps in enforcing the Respondent's decision contained in the Notice of Disciplinary Action dated 15<sup>th</sup> July 2020.**
- 3. This Court be pleased to grant leave to the ex parte applicant to apply for an order of Certiorari to quash the decision of the Respondent contained in the Notice of Disciplinary Action dated 15<sup>th</sup> July 2020.**
- 4. A Declaration that the Respondent has acted contrary to Article 47 and 50 of the Constitution of Kenya**
- 5. The grant of leave herein do operate as a stay of the decision of the Respondent contained in the Notice of Disciplinary Action dated 15<sup>th</sup> July 2020.**
- 6. Any other or further relief that this Court may deem fit to grant.**
- 7. An order that the costs of this application be granted to the Applicant.**

2. The grounds for the application are stated in the Applicant's statutory statement dated 14<sup>th</sup> September 2020, and a verifying affidavit sworn on the same date by the Applicant. In summary, the Applicant states that he was the Chief Executive Officer and Executive Director at Kestrel Capital (EA) from the year 2003 until April 2019 when he resigned, and that while so employed, he was a stockbroker and bond trader at the Nairobi Securities Exchange. Further, that to enable him carry on his duties, the Applicant was duly licenced by the Capital Markets Authority (CMA), and was also a member of the Respondent, which is a body corporate created by the Investment and Financial Analysts Act (No. 13 of 2015).

3. On 5<sup>th</sup> July 2019 the Applicant received an Enforcement Action from the CMA indicating that he had been found culpable of insider

trading contrary to the provisions of the Capital Markets Act. The CMA consequently disqualified him from holding office as a key officer or director of a public listed company and further imposed a financial penalty of KShs. 2,500,000/- (Two Million Five Hundred Thousand shillings) only. Further, that upon receiving the Enforcement Action, the Applicant paid the financial penalty and has not held office as a key office or director of a public listed company for the one-year period following receipt of CMA's enforcement action.

4. Subsequently, on the 7<sup>th</sup> of October 2019, the Applicant received a letter from the Respondent notifying him that an inquiry would be undertaken on the same allegations that the CMA had relied on, and further notified the Applicant on 15<sup>th</sup> July 2020 that they had found him guilty of professional misconduct in execution of his duties, and imposed sanctions on him.

5. The Applicant's main ground therefore, is that the State had already pronounced itself on the matter through the CMA's disciplinary mechanism, and it was against the rules of natural justice for the State revisit the same allegations through another disciplinary mechanism, given that the CMA is represented in the Disciplinary Committee of the Respondent. The Applicant alleged that the Respondent's decision is therefore unreasonable, *ultra vires*, illegal, unconscionable and gross violation of the Applicant's constitutional, statutory and common law rights. Further, that the proceedings conducted by the Respondent were unlawful and procedurally unfair, and rife with bias in contravention of Article 47 and 50 of the Constitution

6. The Applicant annexed copies of the Notice to Show Cause, Enforcement Proceedings and Enforcement Action against him by CMA; pleadings of his appeal against the decision by the CMA which was lodged in the Capital Markets Tribunal; the Notice to Show Cause Letters dated 7th and 30th October 2019 issued by the Respondent, and the letter of notification of the disciplinary action taken against him by the Respondent dated 15<sup>th</sup> July 2020.

### **The Determination**

7. I have considered the application dated 14<sup>th</sup> 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. This for the reason that the Respondent in its decision dated 15<sup>th</sup> July 2020 directed the Applicant to pay an aggregate amount of Kenya Shillings 1,100,000/= imposed as sanctions against him within fourteen days.

8. 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”.**

9. 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 undertaken against him by the CMA and Respondent, and of the Respondent's decision's dated 15<sup>th</sup> July 2020. The *ex parte* Applicant has also averred to the grounds and reasons why it considers the Respondent's decision to be illegal, and cited the legal provisions relied upon.

10. 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.

11. 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.”**

12. 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.

13. 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.

14. 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**.

15. In the present application, the sanctions imposed by the Respondent upon the Applicant are as follows:

- a) Payment of the costs of the Inquiry undertaken by the Respondent's Disciplinary Committee assessed at Kshs 100,000;
- b) Payment of a fine of Kshs 1,000,000; and
- c) Cancellation of membership with the Respondent for a period of ten (10) years.

16. The financial penalty and costs that were imposed by the Respondent are yet to be paid, as the Applicant is specifically seeking to stay their implementation. In addition, there is need to preserve the current *status quo* regarding the payment of the said financial penalties until the legality of the Respondent's proceedings and decision is established, otherwise the Applicant's application in this regard may be rendered nugatory.

17. On the sanction of cancellation of the Applicant's membership with the Respondent, this is a decision that is self-executing, and on which no further positive steps are needed to be taken by the Respondent in its implementation. It is also my view that even if this Court has jurisdiction and the discretion to suspend this sanction, a number of factors militate against the exercise of that discretion.

18. The first factor is that the Court's discretion should be exercised sparingly where a decision has been fully implemented. The second is that there is a public interest element involved in the sanction, in that unlike the imposition of financial penalties that will largely impact on and prejudice the Applicant as an individual, cancelling the membership of the Applicant in the Respondent is of interest to, and has implications for other members of the public and profession.

19. The public interest element in the grant of a stay was also the subject of the decision in **R (H). vs Ashworth Special Hospital Authority (supra)**, where Dyson L.J held that where there is a public interest element involved, the Court strike a balance between the rights of an individual and the public interest, and in striking that balance, the court should usually refuse to grant a stay unless satisfied that there is a strong, and not merely an arguable, case that a decision was unlawful. In the present application, leave has been granted on the basis that the Applicant has an arguable case, and the Applicant still needs to establish the grounds he has set out in his application as regards the illegality of the Respondent's decision.

### **The Orders**

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

**I. The *ex parte* Applicants' Chamber Summons application dated 14<sup>th</sup> September 2020 is hereby certified as urgent, and admitted for hearing *ex parte* and on a priority basis.**

**II. The *ex parte* Applicant is granted leave to apply for an order of Prohibition against the Respondent prohibiting them by their servants, agents and/or employees from taking any steps in enforcing the Respondent's decision contained in the Notice of Disciplinary Action dated 15<sup>th</sup> July 2020.**

**III. The *ex parte* Applicant is granted leave to apply for an order of Certiorari to quash the decision of the Respondent contained in the Notice of Disciplinary Action dated 15<sup>th</sup> July 2020.**

**IV. The *ex parte* Applicant is granted leave to apply for a Declaration that the Respondent has acted contrary to Article 47 and 50 of the Constitution of Kenya.**

**V. The leave granted herein to institute these judicial review proceedings shall operate as a stay of the payment and/or recovery of the financial penalty of Kshs. 1,000,000/- and costs of Ksh 100,000/= that were imposed by the Respondent upon the Applicant in the Notice of Disciplinary Action dated 15<sup>th</sup> July 2020, pending the hearing and determination of the substantive Notice of Motion or I further orders. For the avoidance of doubt, the said leave shall not operate as a stay of the cancellation of the registration of the Applicant as a member of the Respondent imposed by the said Notice of Disciplinary Action.**

**VI. The costs of the Chamber Summons dated 14<sup>th</sup> September 2020 shall be in the cause.**

**VII. 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 14<sup>th</sup> 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 Respondent shall be required to file its response to the substantive Notice of Motion within fourteen (14) days from the date of service.

IX. This matter shall be mentioned on 13<sup>th</sup> October 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](mailto:judicialreview48@gmail.com) and [asunachristine51@gmail.com](mailto: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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto: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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 13<sup>th</sup> October 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 Thursday, 17<sup>th</sup> September 2020.

XVII. Parties shall be at liberty to apply.

21. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 15<sup>th</sup> DAY OF SEPTEMBER 2020

P. NYAMWEYA

JUDGE