



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. E074 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE

FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DISCIPLINARY TRIBUNAL

OF THE LAW SOCIETY OF KENYA.....RESPONDENT

AND

PATRICK MWEU MUSIMBA.....INTERESTED PARTY

EXPARTE:

JOHN WACIRA WAMBUGU

CORRIGENDA TO RULING

1. The ruling delivered herein dated 16th December 2020 is hereby corrected and varied with regards to Orders IV and V thereof, as regards the hearing of the prayer 3 of the Chamber Summons dated 10th December 2020, as follows:

“IV. The *ex parte* Applicant shall file and serve the Respondent and Interested Party with (i) the substantive Notice of Motion, (ii) the Chamber Summons dated 10th December 2020 and skeletal submissions on prayer 3 thereof, (iii) a copy of this ruling, and (v) a hearing notice, within fourteen (14) days from today’s date.

V. Upon being served with the said pleadings and documents, the Respondent and Interested Party shall be required to file their file their responses to, and submissions on prayer 3 of the Chamber Summons dated 10th December 2020 within fourteen (14) days from the date of service.”

2. The Deputy Registrar of the Judicial Review Division shall send a copy of this corrigenda to the *ex parte* Applicant by electronic mail by close of business on Thursday, 24th December 2020.

3. The *ex parte* Applicant shall serve the Respondent and Interested Party with a copy of this corrigenda within fourteen (14) days from today’s date.

4. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF DECEMBER 2020

P. NYAMWEYA

JUDGE

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RULING

1. The Applicant herein, John Wacira Wambugu, is an advocate of the High Court of Kenya, and he has filed an application by way of a Chamber Summons dated 10th December 2020 seeking the following orders:-

a) THAT the application be certified as urgent and service thereof be dispensed with in the first instance.

b) THAT leave be granted to the Applicant to apply for orders of Certiorari to quash the decision of the Law Society of Kenya Disciplinary Tribunal in Cause No. 160 of 2020 involving the ex-parte Applicant, JOHN WACIRA WAMBUGU, the order issued on 12th October, 2020 requiring the Applicant to deposit the undisputed sum of Ksh. 11,279, 287/= and release the same to the Law Society of Kenya.

c) THAT the grant of leave do operate as a stay of the direction of the Respondent herein directing the Applicant to deposit the sum of Kshs. 11,279,287/ = with the Respondent.

d) THAT cost of this suit be provided for.

2. The said application is supported by a statutory statement dated 10th December 2020, the *ex parte* Applicant's verifying affidavit sworn on the same date. The summary of the grounds for the application are that the The Disciplinary Tribunal of the Law Society of Kenya, the Respondent herein, failed to take into account relevant considerations, the statement of accounts and evidence placed before it, and acted irrationally and/ or unreasonably by requiring the Applicant to deposit the sum of Ksh. 11,279,287/= without taking into account that the Interested Party herein owes the *ex parte* Applicant monies over and above the Ksh. 11,279,287/= in terms of legal fees, and that there are Bills of costs filed before the High Court to determine the amounts the said Interested Party owes the *ex parte* Applicant

3. The *ex parte* Applicant annexed copies of his statement of accounts, of the Bills of Costs he has filed in the High Court against the Interested Party, and of the proceedings in the Disciplinary Tribunal on 12th October 2020.

The Determination

4. I have considered the application dated 10th December 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 for reason that the *ex parte* Applicant was required by the impugned order to deposit the said sum of Kshs 11,279,287/ = within 30 days.

5. On the orders sought by the *ex parte* Applicant for leave to commence judicial review proceedings, the applicable law 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.

6. It is also 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 a cursory perusal of the evidence before it and make a decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) 1 WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

7. In the present application, the *ex parte* Applicant has provided evidence of the order made by the Respondent, and of the Bill of Costs he has filed seeking fees from the Interested Party. 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.

8. 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.”

9. 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.

10. 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. A similar decision was made by Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** .

11. 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.”

12. It therefore follows 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. In this regard, the *ex parte* Applicant has not averred to depositing the said sums. However, given the time that has lapsed between the date the said orders were granted on 12th October 2020, and the time of filing of the instant application, this Court needs to confirm what the *status quo* is from the other parties herein before granting any further orders. The prayer for stay will therefore require to be urged *inter partes* for this reason.

The Disposition

14. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 10th December 2020 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants' Chamber Summons application dated 10th December 2020 be and is hereby certified as urgent, and is hereby admitted for hearing *ex parte*.

II. The *ex parte* Applicant is granted leave to apply for an order of Certiorari to the Applicant to apply for orders of Certiorari to quash the decision of the Law Society of Kenya Disciplinary Tribunal in Cause No. 160 of 2020 involving the *ex-parte* Applicant, JOHN WACIRA WAMBUGU, in the order issued on 12th October, 2020 requiring the Applicant to deposit the undisputed sum of Kshs 11,279,287/= and release the same to the Law Society of Kenya.

III. Prayer 3 of the Chamber Summons dated 10th December 2020 seeking orders that the grant of leave do operate as a stay of the direction of the Respondent herein directing the Applicant to deposit the sum of Kshs. 11,279,287/ = with the Respondent shall be heard at an *inter partes* hearing to be held on 28th January 2021.

IV. The *ex parte* Applicant shall file and serve the Respondent and Interested Party with (i) the substantive Notice of Motion,

(ii) the Chamber Summons dated 10th December 2020 and skeletal submissions on prayer 4 thereof, (iii) a copy of this ruling, and (v) a hearing notice, within fourteen (14) days from today's date.

V. Upon being served with the said pleadings and documents, the Respondent and Interested Party shall be required to file their file their responses to, and submissions on prayer 4 of the Chamber Summons dated 10th December 2020 within fourteen (14) days from the date of service.

VI. 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 applications on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

VII. 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.

VIII. 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.

IX. 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.

X. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 28th January 2021.

XI. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant by electronic mail by close of business on Thursday, 17th December 2020.

XII. Parties shall be at liberty to apply.

15. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF DECEMBER 2020

P. NYAMWEYA

JUDGE