



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 412 OF 2015

IN THE MATTER OF WILBERFORCE NYABOGA

MARIARIA

AND

IN THE MATTER OF THE ADVOCATES DISCIPLINARY COMMITTEE

AND

IN THE MATTER OF THE DISCIPLINARY CAUSE NO. 27 OF 2014

**WILBERFORCE NYABOGA MARIARIA.
...APPLICANT**

VERSUS

**THE LAW SOCIETY OF KENYA
RESPONDENT**

RULING

1. By a Chamber Summons dated 23rd November, 2015, the applicant seeks leave of this Court to apply for an order of certiorari to remove into this Court for the purposes of being quashed the orders of the Advocates Disciplinary Committee of the Law Society of Kenya dated 20th July, 2015 and 2nd November, 2015 in Miscellaneous Cause No. 27 of 2014. He also seeks that the grant of leave herein operates as a stay of execution of the judgement therein.
2. When the application came up for inter partes hearing pursuant to the proviso to Order 53 rule 1(4) of the Civil Procedure Rules, **Hon. Mr Justice Onguto**, the Respondent raised a preliminary objection to the grant of the said orders. According to **Mr Olembo** learned counsel for the Respondent, the applicant has sued the Law Society of Kenya while the decision sought to be quashed was made by the Disciplinary Tribunal. The Law Society, it was submitted is established under section 3 of the **Law Society of Kenya Act**, Cap 18 Laws of Kenya while the Disciplinary Tribunal is established under section 57 of the **Advocates Act**, Cap 16 Laws of Kenya. It was therefore submitted that the Tribunal ought to have been the right party to be sued hence the suit as filed, is incapable of giving rise to the orders which the applicant intends to seek. This preliminary objection was not opposed.
3. I have considered the submissions herein. Order 53 rule 7(1) of the **Civil Procedure Rules** provides:

In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.

4. The impugned decision, going by the documents exhibited to the verifying affidavit, was made by the Disciplinary Committee (now the Tribunal). That Committee/Tribunal is established under section 57 of the ***Advocates Act***, Cap 16 Laws of Kenya which also sets out its composition which include six advocates, other than the chairman, vice-chairman or secretary of the Respondent Society. That the Tribunal is a quasi-judicial Tribunal is not in doubt. Accordingly, its decisions are amenable to the supervisory jurisdiction under Article 165(6) of the Constitution.
5. The Respondent Society is however established under section 3 of the ***Law Society of Kenya Act***, Cap 18 Laws of Kenya and has the capacity to sue and be sued.
6. From the foregoing provisions it is clear that the Law Society of Kenya, the intended Respondent herein and the Disciplinary Committee/Tribunal are two distinct legal entities and one cannot be substituted one for the other. However the applicant has not sought leave to apply to quash the decision of the said Committee/Tribunal.
7. The requirement for leave was explained by a three judge bench comprising **Bosire, Mboghli-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321**, Nyamu, J (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See also **Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353**.
8. **Waki, J** (as he then was), on the other hand, in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** put it thus:

“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. This position was confirmed by the Court of Appeal in **Meixner & Another vs. Attorney General [2005] 2 KLR 189** in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.
10. The circumstances which guide the grant of leave to apply for judicial review remedies were

enumerated in Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8 as follows:

“If he [the Applicant] fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers...”

11. In Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK), the Court stated:

“Application for leave to apply for orders of judicial review are normally *ex parte* and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court’s discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him.... Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of John vs. Rees [1970] Ch 345 at 402. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration.”

12. This position was appreciated by **Majanja, J** in *Judicial Review Misc. Civil Appl. No. 139 of 2014 between Vania Investments Pool Limited and Capital Markets Authority & Others in which the learned Judge expressed himself as follows:*

“I do not read the Court of Appeal to be saying that the Court should not have regard the facts of the case or have at best a cursory glance at the arguments. As I stated in Oceanfreight Transport Company Ltd vs. Purity Gathoni and Another Nairobi HC Misc. Appl JR No. 249 of 2011 [2014] eKLR, “In my view, the reference to an “arguable case” in W’Njuguna’s Case is not that the issue is arguable merely because one party asserts one position and the other takes a contrary view.” The duty of the court to consider the facts is not lessened by the mere conclusion that the case is frivolous, or that leave is underserved by examining the facts...Indeed, if leave was to be considered a matter of right then the purpose for which leave is required would be rendered otiose.”

13. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a *prima facie* arguable case for grant of leave. Whereas he is not required at that stage to go into the depth of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile. In my view even at the time of leave to apply for certiorari, the applicant ought to aver there that there is in fact a decision made by the intended respondent which he/she seeks to quash otherwise the Court may be acting in vain especially where the applicant also seeks an order or directions to stay the same decision.

14. In the premises based on this Court’s decision in *Miscellaneous Application No. 379 of 2014 – Republic vs. The Law Society of Kenya ex parte Arthur Wamiti Njoroge*, I find that as the applicant does not seek leave to challenge body whose decision the applicant is aggrieved with, no

- useful purpose will be served by the grant of the leave sought herein.
15. Accordingly, these proceedings are incompetent. In the result, I allow the preliminary objection and decline to grant leave. It follows that these proceedings are misconceived and are hereby struck out with half the costs to the Law Society of Kenya.
16. Orders accordingly.

Dated at Nairobi this 26th day of January, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Olembo for the Law Society of Kenya, the Respondent

Cc Patricia