REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 113 OF 2016

IN THE MATTER OF THE ADVOCATES ACT, CAP 16 LAWS OF KENYA

IN THE MATTER OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA

IN THE MATTER OF THE CIVIL PROCEDURE ACT CAP 21 OF THE LAWS OF KENYA

IN THE MATTER OF AN APPLICATION BY THE APPLICANT, WANGUI KATHRYN KIMANI, FOR LEAVE TO APPLY FOR ORDERS OF

CERTIORARI AND PROHIBITION DIRECTED TO THE DISCIPLINARY TRIBUNAL OF THE LAW SOCIETY OF KENYA (LSK)

IN THE MATTER OF DISCIPLINARY TRIBUNAL CAUSE NO. 137 OF 2014

AND

IN THE MATTER OF THE JUDGMENT OF THE DISCIPLINARY TRIBUNAL DATED 15TH FEBRUARY 2016

BETWEEN

WANGUI KATHRYN KIMANI……APPLICANT

VERSUS

THE DISCIPLINARY TRIBUNAL OF THE

LAW SOCIETY OF KENYA ……..…..RESPONDENT

AND

ROSEMARY JAJA MBOGO……..…INTERESTED PARTY

RULING

1. By a Chamber Summons dated 8th March, 2016, the applicant herein, **Wangui Kathryn Kimani,** an advocate of the High Court of Kenya, seeks the following orders:

    1. **Leave to apply for:**

a. An order of certiorari to remove from this honourable court to quash the decision of the Law Society of Kenya Disciplinary Tribunal issued on 15th February 2016 in cause No. 137 of 2014 which

i. Found the Applicant herein guilty of professional misconduct

ii. Ordered the Applicant to pay within 30 days of the judgment Kshs 1,568,970/= together with interest thereon at the rate of 25% per annum from 1st September, 2011 to the Interested Party herein.

iii. Ordered the Applicant herein to deposit with the Law Society of Kenya Ksh 1,312,500/= together with Interest thereon at the rate of 25% per annum with effect from 1st September 2016.

iv. That the Applicant herein files a bill of costs upon complying with numbers ii and iii above.

b. An order of prohibition prohibiting the Law Society of Kenya Disciplinary Tribunal from sentencing, deliberating, hearing or proceeding further with sentencing scheduled for 18th April 2016 in Disciplinary Cause No. 137 of 2014 pending the hearing and determination of the proceeding herein.

c. That leave once granted do operate as a stay of execution of judgment delivered by the Law Society of Kenya Disciplinary Tribunal cause No. 137 of 2014 on 15th February 2016 pending the hearing and determination of the proceedings herein.

2. The cost of this application be in the cause.

2. According to the applicant, there were procedural ultra vires in arriving at the said decision in that the notice was issued to her 4 months after the trial had started and therefore she had no sufficient time to prepare for the case. Further the judgement in question was signed by an unqualified person in the sense that one **Anna Ngibuini Mwaure** who sat in the matter did not possess a current practising certificate. It was further contended that the Tribunal did not consider the issues raised by the applicant which were material to the issue and instead considered extraneous matters. The Tribunal was further accused of being biased and acting in bad faith.
3. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**
4. The requirement for leave was explained by a three judge bench comprising **Bosire, Mbogholi-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.**

5. **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".

6. 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.
7. 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:

   "The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power…the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter… It is not the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some of the person's legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise the appellant's legal rights or interests were affected. The applicant's complaint in the High Court was that this was so and for that reason he sought leave of the court to have it investigated. It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he 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…In this appeal, the issue is whether the appellant in his

application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a *prima facie* case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a *prima facie* case. For that, he should have been granted leave to apply for the orders sought."

8. In **R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199**, the Court of Appeal was of the view 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.
9. 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."

10. It is therefore clear 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 or she is not required at that stage to go into the depth of the application, he/she has to show that he/she has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile.
11. I have considered the issues raised herein and it is my view that the issues which the applicant intends to raise in the substantive motion are not frivolous. To the contrary if found to be true, they may well justify the grant of judicial review remedies. It is therefore my view and I hold that the applicant had established a *prima facie* case and the leave sought is deserved. Accordingly I grant leave in terms of prayer 1(a) and (b) of the Chamber Summons dated 8th March, 2016 and direct that the substantive Motion to be filed and served within 14 days.
12. With respect to the direction that the leave granted do operate as a stay, this Court has held in Miscellaneous Application No. 363 of 2013 **In Re: Meridian Medical Centre** that:

"...it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding...It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor."

13. Therefore it is not in every case that there are chances of the High Court reaching a decision

contrary to the one in the proceedings sought to be stayed that the High Court will stay those proceedings.

14. In this case, judgement has been given and the only pending issue is sentencing and mitigation. The date for delivery of the judgement was set for 24th August, 2015 but was pushed forward on at least two subsequent occasions. Nothing stopped the applicant from moving this Court immediately she was denied the right to highlight the submissions. Delay in instituting judicial review proceedings is one of the grounds to be considered in deciding whether or not to exercise discretion and direct that leave ought to operate as a stay of the proceedings in question.
15. As was correctly appreciated by **Onyancha, J** in **T O Kopere vs. The Disciplinary Committee Law Society of Kenya & Anor. HCCA No. 461 of 2011**:

"No one, not even the applicant, in my view, has a right to anticipate what the sentence of the Disciplinary Committee, will be, until it is legally pronounced. Indeed to try to stop the Disciplinary Committee from completing carrying out its legal mandate under the relevant law, appears to me to be an illegal exercise which this court in its unfettered discretion, will not be willing to assist the applicant achieve. The stay sought if granted, will without doubt assist the applicant in preventing a lawfully constituted tribunal from carrying out its lawful mandate."

16. Having considered the matters raised in this matter as well as the circumstances of the case, it is my view that a stay ought not to issue. Accordingly, I decline to direct that the leave granted herein shall operate as stay of the proceedings in question.
17. The costs of this application will be in the cause.
18. It is so ordered.

Dated at Nairobi this 15th day of March, 2016.

G V ODUNGA

JUDGE

Delivered in the presence of:

Ms Wangui Kathryn Kimani, the applicant in person

Cc Kazungu