REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 260 OF 2016

IN THE MATTER OF ARTICLE 22, 35 (1) (a), (b), 40, 46 (1) (a) (b) (c),

18, 165 (3), 165 (6), 165 (7) OF THE CONSTITUTION

AND

IN THE MATTER OF THE ACCOUNTANTS ACT NO. 15 OF 2008

IN THE MATTER BETWEEN

REPUBLIC

VERSUS

THE CHAIRMAN, DISCIPLINARY COMMITTEE

INSTITUTE OF PUBLIC ACCOUNTANTS OF KENYA.....1ST RESPONDENT

MOSES KAMANI NJARAMBA T/A

NJARAMBA & ASSOCIATE.....2ND RESPONDENT

THE BOARD OF DIRECTORS

ORIGINAL SIGONA ENTERPRISES LTD.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

THE COMMISSIONER OF DOMESTIC TAXES.INTERESTED PARTY

AND

EX PARTE APPLICANTS:

ISAIAH WAWERU NGUMI

EVANSON J. M. JOMO

DANIEL NGANGA JOEL

RULING

Introduction

1. By a Chamber Summons dated 14th June, 2016 filed in this Court the same day, the applicants herein, **Isaiah Waweru Ngumi**, **Evanson J. M. Jomo** and **Daniel Nganga Joel** seek the following orders:

1. **That this honourable be pleased to certify this application as urgent to be heard on a priority basis.**

2. **That this honourable court be pleased to grant leave to the Applicants to file proceedings for an order Mandamus compelling the 1st Respondent to institute an inquiry into the professional misconduct of the 2nd Respondent.**

3. **That this honourable court be pleased to grant an order of prohibition restraining the 2nd Respondent from expressing his Audit Opinion, Signing the Financial Accounts of Original Sigona Enterprises Limited (O.S.E.L) for the year ended 31st December 2015 as prepared by the 3rd Respondent and/or presenting the said Financial Accounts to the Share Holders of Original Sigona Enterprises Limited in any of their General Meeting(s) called by the 3rd Respondent and to the 1st Interested Party herein pending the hearing and determination of this application and the Substantive Petition herein or any other orders.**

4. **That this honourable court be pleased to grant an order of Prohibition restraining the 2nd Respondent restrained from receiving any further remuneration for any purported audit work done on the Financial Accounts for Original Sigona Enterprises Limited (O.S.E.L) prepared by the 3rd Respondent herein pending the hearing and determination of this application and the Substantive Petition herein or any other orders.**

5. **That this honourable court be pleased to grant an order of Prohibition restraining the 2nd Respondent restrained from receiving any further remuneration for any purported audit work done on the Financial Accounts for Original Sigona Enterprises Limited (O.S.E.L) prepared by the 3rd Respondent herein pending the hearing and determination of this application and the Substantive Petition herein or any other orders.**

6. **That this honourable court be pleased to grant an order of prohibition restraining the 1st Interested Party from receiving, accepting and/or acting upon Financial Accounts of O.S.E.L for the year ended 31/12/2015 as prepared by the 3rd Respondent if they contain the Audit Report of the 2nd Respondent herein pending the hearing and determination of this application and the substantive petition herein or any other orders.**

7. **That this honourable court be pleased to grant an order of Mandamus compelling the 3rd respondent to supply the Applicants with the Signed Minute of the General Meeting of O.S.E.L held on 20/2/206.**

8. **That the leave granted herein operate as stay as per prayers 4, 5, and 6 above pending the hearing and determination of this application and the substantive petition herein or any other orders.**

9. **The costs of this application be awarded to the applicants.**

Applicants' Case

2. According to the applicants, their constitutional rights to property as enshrined in Article 46(1)(a)(b) and (c) of the Constitution of Kenya is threated with violation by the Respondents unless restrained from resenting the audit opinion of the Financial Accounts of the Original Sigona Enterprises Limited (hereinafter referred to as "the Company"). It was their case that the 2nd respond was too compromised by the 3rd respondent as the 3rd respondents were witnesses before a tribunal instituted by the 1st respondent.

3. According to the Applicants who claimed to be bona fide shareholder of the said Company,, the 2nd respondent, the company's external auditors, were mandated to do an in depth investigation into the affairs of the Company and submit their report to the shareholders within 90 days of the resolution to the effect.

4. However, the 2nd respondent failed to do so within the prescribed. However, on presentation of the said report, the applicants discovered that the said report was defective. Following inquiries made by the applicants, they lodged a complaint to the said auditors and the 1st respondent herein (hereinafter referred to as the disciplinary committee") to which the applicants received responses. Although the applicants reacted to the said responses, no further communication was received from the said respondents.

5. The next communication the applicants received was a notice convening the annual general meeting of the company to which was attached a copy of the Company's financial accounts prepared by the 3rd Respondent. According to the applicants, the said accounts did not bear the signatures of the 2nd respondent. The applicants contended that in light of their pending complaints, the preparation of these statements was an act of impunity since in their view, the 2nd respondent is not fit to give an Audit Opinion of the Financial Accounts. It was their case, that the said action amounted to a threat to violation of their consumer rights as enshrined in Article 46(1)(a)(b) and (c) of the Constitution.

6. To the Applicants, the interested party herein stands to be misled by the respondents' actions of presenting the said accounts.

7. The application was based mainly on the basis that the facts of this case do not bring the dispute within the ambit of judicial review hence no prima facie case was disclosed. To the 1st respondent, since it has initiated the disciplinary proceedings as sought by the Applicants, an order of mandamus cannot issue in the manner sought. It was further contended that the order sought herein cannot issue for the reason that judicial review orders can only be issued against public bodies.

Determinations

8. I have considered the instant application, the affidavits in support thereof and the ground filed in opposition thereto, as well as the submissions on record.

9. 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.**

10. **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".**

11. 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.

12. 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…"**

13. 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."**

14. 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.

15. I have considered the Applicants' grounds for seeking judicial review reliefs. The Applicants' main grievance seems to be the manner in which the directors of the company are conducting the affairs of the company. Though the applicants seek an order of mandamus against the disciplinary committee it is clear from the applicants' own exhibits that the disciplinary committee has put into motion the machinery for determining the applicants' complaints against the 2nd respondent. Accordingly, the intended relief against the disciplinary committee seems rather remote. With respect to the interested party, the interested party has its own legal machinery for ensuring that proper taxes are remitted and is empowered to conduct its own investigations to determine the correct amount of taxes due to it.

16. In this case, the applicants' complaints seem to be directed at the manner in which the affairs of the company are being conducted by the company directors in collusion with the 2nd respondent. In my view such a dispute ought to be dealt with in accordance with the procedure provided for under the Companies Act rather than in judicial review proceedings.

17. As was held in **Speaker of the National Assembly vs. Karume Civil Application No. Nai. 92 of 1992**, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

18. The applicants contended that they could not seek in ordinary civil proceedings orders they seek against the 1st respondent and the interested party in such a suit. I have already found that the orders intended to be sought against the 1st respondent may not succeed in the light of the fact that the 1st applicant has already put into motion the process through which the applicants' complaint may be resolved. If the 1st respondent is not acting expeditiously, the option would be to move the Court for orders compelling it to expedite the hearing of the complaint rather than to compel it to institute an inquiry into the professional conduct of the 2nd respondent when such inquiry has been commenced.

19. With respect to the orders sought against the interested party, it is true that the interested party is under statutory obligation to receive statements of accounts submitted to it. Whether or not the statements are correct is another matter. The Court cannot however restrain it from undertaking its statutory duties. It is for the interested party to verify the correctness or otherwise of the statements submitted to it.

20. Having considered the grounds of this application, it is my view that the issues raised are properly speaking not matters for judicial review but may well be the subject of ordinary civil proceedings. In the premises I am not convinced that the Applicants have established *prima facie* grounds for the grant of the leave sought. As was held by **Stephen Brown, LJ** in **R vs. Secretary of State ex parte Swati [1986] 1 All ER 717**, the onus is on an applicant to show that he has arguable grounds for challenging the decision complained of. It is not sufficient merely to express disagreement, however strong.

Order

21. In the premises I decline to grant the leave sought herein. Leave having been declined, stay which is consequent to leave being granted is not available

22. Consequently, the Chamber Summons dated 14th June, 2016 is incompetent and is struck out but with no order as to costs as the judicial review proceedings proper are yet to be instituted and as the parties herein are substantially members of a company hence the need to promote harmony and reconciliation amongst them.

Dated at Nairobi this 17th day of June, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Isaiah Waweru Ngumi the 1st Applicant

Mr Ogembo for the 1st Respondent

Miss Almadi for the interested party