



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR.MISC.CIVIL. APPL. NO.328 OF 2011

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW**

AND

**IN THE MATTER OF: THE DISCIPLINARY COMMITTEE OF THE INSTITUTE OF
CERTIFIED PUBLIC ACCOUNTANTS OF KENYA**

BETWEEN

JULIUS NGUMBAU MWENGEI T/A

MWENGEI & ASSOCIATES.....APPLICANT

VERSUS

THE INSTITUTE OF CERTIFIED

PUBLIC ACCOUNTANTS OF KENYA.....RESPONDENT

R U L I N G

On 16th December 2011 the Exparte Applicant filed a Chamber Summons application dated the same day seeking the following orders:

- 1) **This Honourable Court be pleased to grant leave to the applicant to apply for orders of certiorari directed to the Institute of Certified Public Accountants of Kenya, to remove to this court and quash and/or set aside the decision to suspend the applicant's practicing certificate as contained in the letter dated 28th October, 2011 and to pay costs of Kshs.42,000/- and a fine of Kshs.20,000/-**
- 2) The granting of leave as aforesaid to operate as a stay of suspension of the applicant's practicing certificate issued by the respondent.
- 3) The costs of this application be in the cause.

The application was supported by a statement of facts and supporting affidavit sworn by the Exparte Applicant on 16th December, 2011.

On the date the application was fixed for hearing on 28th February 2012, Mr. Njue Counsel for the Respondent informed the court that the Respondent was not opposed to the applicant being granted leave to Institute Judicial Review proceedings for orders of certiorari as prayed and was only opposed to the grant of leave operating as stay as prayed in Prayer 2.

Given the Respondent's position, the court proceeded to grant leave as prayed and directed that application be heard inter parties on the issue of whether or not leave granted should operate as stay as prayed.

On 5th March 2012, Mr. Wainaina for the Exparte applicant and Mr. Njue for the Respondent made brief submissions before me advancing their respective positions on the issue of stay.

Relying on a replying affidavit sworn by John K. Wambugu on 3rd

February 2012, the Respondent opposed the applicant's prayer that leave granted should operate as stay primarily on grounds that the applicant had not established a *prima facie* case that would form the basis of issuing such orders.

The gist of Mr. Njue's submissions was that the Respondent was statutorily mandated under the Accountants Act No.115 of 2008 to take disciplinary action against its members with the aim of promoting standards of professional competence and practice among its members who were accountants and auditors.

That the applicant being one of its registered members, the Respondent was acting within its aforesaid mandate in investigating complaints made against the applicant and that in the disciplinary proceedings that followed before a decision was reached to suspend the applicant's practicing license among other sanctions, the Applicant had been given opportunity to make both oral and written presentations before the Respondent and that therefore the complaint that the Respondent had breached the rules of natural justice had no basis.

Mr. Wainaina on his part submitted that the applicant had established a *prima facie* case that entitles it to the grant of orders as sought.

He argued that in the disciplinary proceedings that led to the Respondent's impugned decision, the applicant was not given a chance to be heard or to face his accusers contrary to the cardinal principle of natural justice. Secondly, that the Respondent erred in proceeding to suspend the applicant on the basis of allegations that were the subject matter of litigation in HCC 249/2010 still pending before the Machakos High Court instead of waiting for the High Court to reach a determination on the matters in issue.

Lastly, it was Mr. Wainaina's contention that the applicant was entitled to orders of stay since the impugned decision had the effect of denying him his sole source of livelihood.

Having considered the application and the rival submissions made by the parties herein as summarized hereinabove, I find that the only issue left for the court to determine is whether or not the applicant is deserving of the orders of stay as prayed.

Before determining this application one way or the other I think it is important to examine the principles which should guide the court in deciding whether or not to grant stay in Judicial Review proceedings.

In this regard I fully associate myself with the sentiments expressed by J. Maraga when he expounded on the said principles in the case of **Taib A. Taib –Vs- The Minister for Local Government, Misc. Civil App. No.158/2006** when he stated as follows:

"I also want to state that in judicial review applications like this one the court should always ensure that the Ex-parte applicant's application is not rendered nugatory by the acts of the respondent during the pendency of the application. Therefore where the order of stay is efficacious the court should not hesitate

to grant it. Even with that in mind, however, it should never be forgotten that stay orders are discretionary and their scope and purpose is limited”.

I wish to point out at the outset that though the parties had gone to great lengths to state their positions on whether or not the Respondent breached the rules of natural justice when arriving at the impugned decision, I find that at this preliminary stage it would be inappropriate for me to make any final finding on that point since this might prejudice the hearing of the substantive motion. Suffice it to say that the procedural propriety of the process leading to the said decision has been challenged by the applicant. Given this fact and considering that the impugned decision has the effect of halting the applicants practice of his profession for two years thus denying him his source of livelihood and considering that it is not disputed that there is a pending case at the High Court in Machakos touching on the same issues that led to the suspension of the applicant’s practicing certificate which is yet to be determined, I find that it will be just, fair and efficacious if orders of stay were granted in this case as prayed so that the applicant can continue earning his living as the propriety or otherwise of the process leading to the impugned decision is investigated in the main Judicial Review proceedings as this will not occasion any prejudice on the Respondent.

Consequently, I allow Prayer 2 and Order that leave granted herein do operate as stay of the Respondents decision to suspend the applicant’s practicing certificate till hearing and determination of the Judicial Review proceedings or until further orders of this court.

DATED and**SIGNED** by me at Nairobi this **16th** day of **March**, 2012.

C. W. GITHUA
JUDGE

In the presence of:

Florence – Court Clerk

Mr. Wainaina for Applicant

Mr. Njue for Respondent