



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURTS
CIVIL APPEAL 540 OF 2007

- 1. ASENATH MASESE KIBORE**
- 2. SOLOMON AMBWERE**
- 3. DOMENIC MUTEGI**
- 4. WILLY K. KETER**

5. DR. ZACHARY C. ABIERO-GARIY
.....**APPELLANTS**

V E R S U S

- 1. THE PHYSICAL PLANNERS REGISTRATION BOARD**
- 2. THE REGISTRAR, PHYSICAL PLANNERS REGISTRATION BOARD**
- 3. THE KENYA INSTITUTE OF PLANNERSRESPONDENTS**

R U L I N G

The 1st Respondent in this appeal, THE PHYSICAL PLANNERS REGISTRATION BOARD, is a body corporate duly established under section 3(1) of the **Physical Planners Registration Act, 1996** (the Act). Its statutory functions include registering all eligible persons to practice as physical planners in accordance with the provisions of the Act; to set and conduct examinations for purposes of registration of members; and to verify the qualifications and eligibility of the applications seeking registration with the Board (section 3(4) of the Act).

Regarding conditions and qualifications for registration as physical planners, section 12 of the Act provides as follows:-

“12 (1) Subject to this Act, a person shall be entitled, on making an application to the Board in the prescribed form and on the payment of the prescribed fee, to be registered and to have his name entered in the register if:-

(a) He is the holder of a bachelor’s or postgraduate degree in urban or regional planning or both from any university which is recognized for the time being by the Board and has passed an examination prescribed by the Board;

(b) He has been admitted as a corporate member of an approved professional institution whose qualifications for such admission are not less than those prescribed in paragraph (a) ; or

(c) If before the commencement of this Act he is a corporate member of the Architectural Association of Kenya Planning Chapter).

(2) A person shall not be eligible to take the examinations prescribed by the Board unless he has had two years post qualification practical experience in physical planning.

(3) Notwithstanding the fact than an applicant is qualified in terms of subsection (1), the Board may require the applicant to satisfy the Board that his professional and general conduct has been such that, in the opinion of the Board, he is a fit and proper person to be registered under this Act, and the Board may direct the Registrar to postpone the registration of the applicant until it is so satisfied.”

In January 2006 the Appellants in this appeal applied to the 1st Respondent for registration as physical planners upon the strength of the fact that they had sat and passed requisite professional practice examinations set and conducted by the 3rd Respondent, THE KENYA INSTITUTE OF PLANNERS, and were formally admitted as corporate members of the 3rd Respondent, an approved professional institution. By letter dated 24th April, 2007 the 1st Respondent declined to register the Appellants upon the ground that they had not passed an examination prescribed by the Board. The Board also, in effect, advised them to sit for the 2007 examinations to be conducted in the months of October and November 2007.

The Appellants appealed under section 19 of the Act, against the Board’s refusal to register them. That section provides that any person aggrieved by a decision of the Board refusing to register his name, *inter alia*, may, within sixty days after he has received the written decision of the Board, appeal to the High Court against the decision of the Board. The decision of the Board refusing to register the Appellants having been communicated by letter dated 24th April, 2007, and the Appellants’ appeal having been lodged on 21st June, 2007 by memorandum of appeal dated 21st June, 2007, I am satisfied that the appeal was lodged within the time prescribed by law and is properly before the court. This position is not altered in any way by the fact that an amended memorandum of appeal was filed on 27th June, 2007. The amended memorandum of appeal must refer back to the original memorandum.

On 6th July, 2007 the Appellants filed an application by notice of motion of the same date. They seek two main orders. The first one is, in effect, that the decision of the Board refusing to register them be stayed pending disposal of the appeal. The second order sought is, in effect, that the Board’s decision “requiring” the Appellants to apply for and sit the year 2007 examinations, and the notice published on 10th May, 2007 “**together with all other consequential orders/decisions**” be stayed pending disposal of the appeal. By the said notice the Board invited applications for the year 2007 examinations for registration of physical planners. It is therefore apparent that the Appellants are not only seeking in this application a stay of the requirement of the Board that they sit and pass the examination if they want to be registered, but also a stay of conduct of the year 2007 examinations.

The application is essentially brought under Order 41, rule 4 of the Civil Procedure Rules (the Rules). The grounds for the application are, *inter alia*;

1. That the Board’s decision that the Appellants sit a further examination is oppressive and illegal.
2. That if the Board is allowed to conduct the year 2007 examinations before the appeal is determined the Appellants will be greatly prejudiced as they will lose their seniority in the profession.
3. That the Appellants are entitled to registration as a matter of law.

4. That the application has been brought without undue delay.

5. That the Appellants are ready and willing to give security as may be ordered.

There is a supporting affidavit sworn by the 4th Appellant. He has the written authority of the other Appellants to plead on their behalf. The supporting affidavit sets out the factual basis for the application. A supplementary affidavit sworn by the same 4th Appellant and filed on 17th October, 2007 in response to the 1st and 2nd Respondents' replying affidavit raises the argument that the Attorney-General should not represent the 1st Respondent in these proceedings as it is an independent statutory body and not a Government department or parastatal. This ground was not pursued during arguments. In any event it has no legal backing. See the case of **CHIEF NEHEMIA GOTONGA –VS- STEPHEN KINYANJUI [1959] EA 1096**, a decision of the then **Eastern African Court of Appeal**. The court held, *inter alia*, that it was within the administrative discretion of the Attorney-General to decide whether it is in the interests of the Crown (read Government or Republic) that a particular litigant should be provided with legal representation.

The 3rd Respondent has supported the Appellants' application as set out in its two “**replying**” affidavits filed on 18th and 22nd October, 2007.

The 1st and 2nd Respondents have opposed the application as set out in their replying affidavit sworn by one TIMOTHY WAIYA MWANGI, the Registrar of the Physical Planners Registration Board (2nd Respondent). It is not quite clear why the Registrar of the Board has been joined in the appeal (and the application). He is a public officer who holds and vacates office in accordance with the terms of his appointment (section 5 of the Act). He appears only to have communicated to the Appellants the decision of the Board not to register them; it was not his decision. This replying affidavit was filed on 11th October, 2007. There is a further replying affidavit, again sworn by Mr. Mwangi, filed on 8th November, 2007. The grounds of opposition emerging from the two replying affidavits are, *inter alia*;

1. That the Appellants had not sat and passed an examination prescribed by the 1st Respondent as required by law.
2. That the 1st Respondent cannot under the law (section 3 (4) (b) as read with section 12 (1) (a) and (b) of the Act) delegate to any other body its mandate to prescribe examinations under section 12 (1) (a) of the Act.
3. That whereas the Appellants sat and passed an examination set by the 3rd Respondent for the purpose of admission as the 3rd Respondent's corporate members, that examination was not one prescribed by the 1st Respondent as required by section 12 (1) (a) of the Act.
4. That the Appellants' corporate membership of the 3rd Respondent does not, of itself, entitle them to registration.
5. That granting the orders of stay sought would derail the statutory functions of the 1st Respondent.
6. That the order of stay sought in prayer No. 3 of the application would be unfair and punitive to other members of the profession who are not parties in these proceedings.

I have considered the submissions of the learned counsels appearing, including the authorities cited. The appeal will obviously turn on the interpretation of section 12(1) of the Act as read with section 3(4) of the same Act. It has been submitted for the Appellants that an applicant for registration is entitled to registration if he satisfies any of the three requirements set out in section 12(1) aforesaid, and that therefore, the Appellants being corporate members of the 3rd Respondent, an approved professional

institution under section 12(1) (a), they are entitled by dint of that corporate membership of the 3rd Respondent, to registration. It is also submitted for them that the examination set by the 3rd Respondent which they sat and passed, thus becoming corporate members of the 3rd Respondent, was also an examination prescribed by the Board under section 12(1) (a).

For the 1st and 2nd Respondents it has been submitted, first, that the examination sat and passed by the Appellants (which was set by the 3rd Respondent) was not an examination prescribed by the 1st Respondent; that in any case the 1st Respondent could not in law delegate to the 3rd Respondent its mandate to prescribe the examination; and that the Appellant's corporate membership of the 3rd Respondent does not of itself entitle them to registration.

The above arguments raise issues that can be determined with finality only at the hearing of the appeal. But I must observe, without deciding the issue, that there is not the article "or" after section 12(1) (a); the article appears after section 12 (1) (b). It appears therefore, *prima facie*, that an applicant for registration must fulfill both conditions set out in section 12(1) (a) and (b) in order to qualify for registration. Paragraph (b) is not an alternative to paragraph (a). But paragraph (c) is an alternative to paragraphs (a) and (b).

Prayer No. 2 of the application seeks an order, in effect, to stay the decision of the 1st Respondent refusing to register the Appellants. If the stay as sought were granted, what would its effect be? Would it be to compel the 1st Respondent to register the Appellants before their appeal is heard and determined? Clearly that would not be a desirable thing to do as it would have the effect of pre-determining the appeal in favour of the Appellants before it is heard. Can the decision of the 1st Respondent, which did not facilitate the doing of anything positive but merely refused the Appellants registration, a negative act, be usefully stayed? I think not.

What about the stay sought in prayer No. 3? If granted the year 2007 examinations will have been stopped. Those examinations are already under way and some aspects of them have already been completed. They are being sat by other persons who are not parties to these proceedings and whom the Appellants have not sought to join. These other persons include the Appellants' co-applicants who also the 1st Respondent refused to register but who decided not to challenge the decision but to sit the year 2007 examinations duly prescribed by the 1st Respondent. The court cannot, and will not, make an order that will adversely affect persons who are not parties in the proceedings.

An application for stay under Order 41, rule 4 of the Rules must demonstrate sufficient cause why such stay should be granted. Having considered all matters placed before the court I do not find such sufficient cause. Additionally, the applicant must satisfy the court that substantial loss may result to him unless the order is made, and that the application has been made without unreasonable delay. Whereas I am satisfied that the application has been made without unreasonable delay, I am not satisfied that substantial loss may result to the Appellants in the circumstances of this case. They will be entitled to registration if they succeed in their appeal; if they fail they will be at liberty to sit an examination duly prescribed by the 1st Respondent, and if they pass they will be entitled to registration.

In the result I must refuse the application by notice of motion dated 6th July, 2007. It is hereby dismissed with costs to the 1st and 2nd Respondents. As the application was not directed at the 3rd Respondent at all, it will not get any costs. Those shall be the orders of the court.

DATED AT NAIROBI THIS 13TH DAY OF NOVEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 16TH DAY OF NOVEMBER, 2007