



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 1114 of 2007

DAVID KINYANJUI GATIMU.....APPLICANT

Versus

THE PHYSICAL PLANNERS REGISTRATION BOARD.....1ST RESPONDENT

THE HONOURABLE THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

This judgment relates to a Notice of Motion filed and dated 12th October 2007 in which the ex parte Applicant David Kinyanjui Gatimu seeks the following orders:

1. An order of certiorari do issue to remove into the High Court and quash the decision of the physical Planners Registration Board denying the Applicant an opportunity to sit the Registration for Physical Planners Examination for the Registration for the year 2007;
2. An order of prohibition to stop and/or refrain the Respondents from administering the Registration for Physical Planners Examination for the year 2007 contrary to the Physical Planners Act No. 3 of 1996;
3. An order of mandamus directing the Physical Planners Registration Board to reconsider the Applicant's Application to be allowed to sit the Registration for Physical Planners examination for the Registration for the year 2007;
4. Costs to filing Application be borne by the Respondent.

The Application was based on the Statutory Statement dated 9th October 2007 and a Verifying Affidavit sworn by the Applicant dated 4th October 2007 and filed in court on the date. The Applicant also filed skeleton arguments dated 15th October 2007. The Applicant was represented by Mr. Njenga whereas Ms. Munyi represented the Respondent. The Respondent in opposing the Notice of Motion, filed a Replying Affidavit, sworn by Timothy Waiya Mwangi, the Registrar, Physical Planners Registration Board, dated 25th October 2007 and skeleton arguments of the same date.

A brief background of the case is that the Applicant is a holder of a masters Science degree in Urban Planning from Oxford Brooks University and has worked for over 2 years in the field of Urban Planning.

On 10th May 2007, the Respondent which is a Statutory Body established under the Physical Planners Registration Act No. 3 of 1996 put up an advertisement in the Daily Nation inviting interested and

qualified Applicants to apply to sit the Registration of Physical Planners Examination to be offered in the month of October and November 2007. The Applicant met the requirements in the advertisements, paid the required fees of Kshs.2500/= on 6th June 2007 and was issued with a log book for his further action and was required to return it on or before 29th July 2007 and he did so on 23rd July 2007 when he paid a further Kshs.15000/=. He did not hear from the Respondent until he wrote to them a letter dated 26th September 2007 seeking advice on when the examination would be done. On 1st October 2007, the Respondent received a letter dated 18th September 2007 from the Respondent indicating that the Board had declined to allow the Applicant to sit for the Examinations for reasons that he did not qualify in accordance with S.3 & 12 of the Physical Planners Registration Act, 1996 because he is a graduate member but not corporate member and that they would refund his Kshs.15000/=. Mr. Njenga, Counsel for the Applicant submitted that the requirement that the Applicant be a corporate member exceeds the requirements set out in Sections 12 (2) of the Act. That the Act only requires him to possess 2 years post qualification practical experience in Physical Planning. That in any event the Respondent's decision is therefore illegal, unfair, unreasonable, made in excess of jurisdiction and made in bad faith. That the Applicant needs to sit for these examination in order to qualify as corporate member.

In response to the Respondent's Affidavit in opposing the Application, Mr. Njenga submitted that the Respondent is relying on the opinion of the Attorney General on what the qualifications of Applicants for these examination should be but that although the opinion was sought in March 2007, and made available in April, 2007, the Respondent never communicated the same when they made the advertisement in May 2007, that one had to be a corporate member to qualify. According to Counsel, that opinion is not relevant to these proceedings.

Counsel relied on the following authorities:

1. **REP V COMMISSIONER OF CO-OPERATIVES ex parte KIRINYAGA TEA GROWERS CO-OPERATIVE SAVINGS & CREDIT SOCIETY LTD (1999) 1 EA 239**
2. **KENYA NATIONAL EXAMINATION COUNCIL V REP CA 266/1996** in which the Court of Appeal considered the nature and scope of Judicial Review orders of mandamus, prohibition and certiorari.

In opposing the Application Timothy Waiya Mwangi swore a Replying Affidavit dated 25th October 2007 and filed in court on 26th October 2007. The deponent is the Registrar, Physical Planners Registration Board. He deponed that one of the functions of the Respondent set out under S. 3(4) of the Act is,

- (a) Register all eligible persons to practice as Physical Planners;
- (b) Set and conduct examinations for purposes of Registration of members;
- (c) Verify the qualifications and eligibility of Applications of Applicants seeking Registration with the Board among other functions.

That pursuant to S.12 of the Act and the advise given by the Attorney General, an interpretation of S. 3(4) (b) as read with S. 21(1) (a) and (b) of the Physical Planners Act, was sought from the Attorney General, under his letter of 7th March 2007. The Attorney General by his letter of 4th April 2007 advised that for one to qualify for registration as a Physical Planner one must comply with S.12(1) (a) and (b) and (c). That a notice was put up on 10th May 2007 stating the conditions to apply for registration of the Physical Planners Examination (DKG 1), for purposes of Registration of Physical Planners. That the Applicant does not qualify to sit the examination for Registration as he is not a corporate member but a graduate member.

That they received several Applications which they have considered. That the examinations involved several processes including submission of 2 projects and the examination have already commenced and therefore the Applicant's Application has been overtaken by events and is untenable. That in any event if

the prayers sought were granted they would adversely affect people who are not parties to this Application. In addition Ms. Munyi submitted that the Application is fatally defective and should be dismissed. She submitted that the Judicial Review Application should have been brought in the name of the Republic but the ex parte Applicant is described as the Applicant. Counsel relied on the authorities of:

1) **FARMERS BUS SERVICE & OTHERS V THE TRANSPORT LICENSING APPEALS TRIBUNAL (1959) EA 779;**

2) **PAGREX INTERNATIONAL V MINISTER FOR FINANCE & OTHERS MISC APPLICATION NO. 875/01;**

3) **KENTON KIJABE HILL FARMERS CO-OPERATIVE SOCIETY V THE D.O. NAIVASHA**

Where the courts have held that Judicial Review Applications are brought in the name of the Republic.

Secondly, Counsel submitted that the Verifying Affidavit and Statements of fact are dated 4th October 2007 whereas the Chamber summons is dated 12th October 2007 which offends Order 53 Civil Procedure Rules which provides that they should all be filed together and they should also be struck out.

On availability of the orders, Counsel submitted that the Applicant did not qualify to sit for the examination as required by S.12 1 (b) of the Physical Planners Registration Act as he has to be a corporate member before he can undertake it. That the Applicant applied for what was not and the Respondents acted within the law and the decision cannot be quashed.

On prohibition, Counsel said that prohibition applies to stop future decisions but that in his case, the examination is already in progress and the orders cannot lie.

Of mandamus, Counsel urged that the order can only issue to compel a public authority or public officer to perform his statutory duty (**KENYA NATIONAL EXAMINATION COUNCIL CASE (supra)**). That the Respondent has performed its duty under S.3(4) of the Act in that it has conducted examinations. That if orders were granted they would offend public policy and public interest in that other people who are not parties in this Application will be affected by any orders that the court may make.

On the question of the Application being defective Mr. Njenga replied that the defects only go to form and that they should have been raised a preliminary objection.

I have now considered the Application, submissions by Counsel, authorities that were cited and I think I should first of all consider the objection raised by Ms. Munyi on the competency of the Notice of Motion.

It is now trite that Judicial Review applications are brought in the name of the Republic and they should be properly intitled. That was the decision in the **FARMERS BUS CASE (supra)** which was adopted by Justice Ringera in the case of **WELAMONDI V CHAIRMAN ECK (2002) 1 KLR 486;** also in the **PAGREX CASE (supra)** by Justice Nyamu, and in **KENTON KIJABE HILL FARMERS CO. SOCIETY CASE** by Justice Aganyanya and many other cases.

The Notice of Motion should be brought in the name of the Republic because the prerogative writs which became Judicial Review orders were a mechanism put in place by the State to check on the excesses of its officers or tribunals. So that once leave is granted to bring a Judicial Application, the Republic takes over the Application against its own officers at the instance of the ex parte Applicant. Chamber Summons seeking leave is brought by the Applicant but the Notice of Motion must be in the names of the Republic as the Applicant and should be properly instituted.

The **FARMERS BUS CASE** and **WELAMONDI CASES** did set out the format of the Chamber Summons and Notice of Motion Applications.

What is the effect of non compliance with bringing the Application in the name of the Republic? The effect is that the Application is rendered incompetent and it must be struck out. That is the finding in the **PAGREX CASE, KENTON HILL CASE, and WELAMONDI CASE** which I wholly agree with. For the above stated reasons I hereby find that the Notice of Motion dated 12th October 2007 is fatally defective and is hereby struck out. So that the Applicant is not shut out, I will not consider the merits of the Application so that the Applicant, if he so wishes, can move the court again for Judicial Review orders. Costs to the Respondent.

Dated and delivered this 16th day of November 2007,

R.P.V. WENDOH

JUDGE

Read in the Presence of

Mr. Nyaga for the Applicant

Mrs. Munyi for the Respondent

Daniel: Court Clerk