



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E015 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF FOR ORDERS OF DECLARATION, MANDAMUS, CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

UNCLAIMED FINANCIAL ASSETS AUTHORITY.....RESPONDENT

EX PARTE APPLICANT: AIG KENYA INSURANCE COMPANY LIMITED

RULING

1. AIG Kenya Insurance Company Limited, the *ex parte* Applicant herein, is aggrieved by demand letters dated 23<sup>rd</sup> November 2020 and 20<sup>th</sup> of January 2021 demanding payment of Kshs. 138,250,058.00 being unclaimed assets and Kshs. 3,926,751.00 within 14 days from the date of receipt of the letters.

2. The *ex parte* Applicant has consequently moved this Court in an application by way of Chamber Summons dated 4<sup>th</sup> February 2021, seeking the following orders:

- 1. **“THAT the application for leave herein be certified as urgent and be heard as a matter of urgency.**
- 2. **THAT the requirement of lapse of one day from service of the notice for these proceedings be dispensed with under the provisions of order LIII rule 1(3).**
- 3. **THAT pending the hearing and determination of this application:**
  - a. **There be a stay of the execution, implementation and/or enforcement as against the Applicant or any of its employees or agents of the decision contained in the Respondent's letters dated the 23<sup>rd</sup> of November 2020 and 20<sup>th</sup> January 2021 howsoever, particularly by the institution of any recovery proceedings or mechanisms [whether civil or criminal] or the issuance and/or implementation of any or any further decisions or notices to demand from the Applicant the payment of any sums due under the Unclaimed Financial Assets Act for the reporting period 1<sup>st</sup> November 2014 to 1<sup>st</sup> November 2019.**
  - b. **There be suspension of implementation of the following provisions of the Unclaimed Financial Assets Act: Section 52(5); Section 33(4); Section 33(5); section 31(6) and section 31(7).**
- 4. **THAT this Court be pleased to grant the Applicants leave to apply for:**
  - a. **An order of Certiorari to remove into the High Court and quash the demand letter dated 23<sup>rd</sup> November 2020 issued against the Applicant, demanding the payment of Kshs. 138,250,058.00 being unclaimed assets and Kshs. 3,926,751.00 being audit fees .**
  - b. **An order of Certiorari to remove into the High Court and quash the findings of the audit report prepared and**

published by Messrs. K.M. Ndura & Associates on a date unknown to the Applicant in so far as it returned a finding that (1) the Applicant was holding identified unclaimed assets under section 5 of the Unclaimed Financial Assets Act whose value totaled Kshs. 138,250,058.00, (2) penalties and interest payable by the Applicant under the provisions of sections 33 of the Unclaimed Financial Assets Act was a sum of Kshs. 312,793,838.00.

c. An order of Prohibition directed at the Respondent prohibiting and restraining the Respondent whether acting directly or through any of their agents, employees and/or officers from issuing, executing, enforcing and/or implementing any or any further decisions, demands or notices as against the Applicants based on the Messrs. K.M. Ndura & Associates Audit Report.

d. A Declaration that the provisions of section 5 of the Unclaimed Financial Act do not apply to the asset described in the audit report of Messrs. K.M Ndura & Associates as "credit balances on accounts receivable" (being premium receivables).

e. A Declaration that the provisions of section 5 of the Unclaimed Financial Act do not apply to the asset described in the audit report of Messrs. K.M Ndura & Associates as "credit balances in paid claims register".

f. A Declaration that the provisions of section 52(5) of the Unclaimed Financial Assets Act is unconstitutional, and to the extent of the unconstitutionality, null and void .

g. A Declaration that in assessing the interest and penalties payable by the Applicants [or any other person or holder] under the provisions of sections 33(4) and 33(5) of the Unclaimed Financial Assets Act, the Respondent has a constitutional, statutory, and legal duty and obligation to ensure that the 'willful' threshold has been met and also, consider relevant mitigating factors and give reasons for applying any penalty [highest or lowest] provided for in law.

h. A Declaration that there is no obligation under the provisions of section 20(1) of the Unclaimed Financial Assets Act for an entity/person which is not holding assets presumed abandoned and subject to the custody of the Authority to file a report with the Authority.

i. A Declaration that the provisions of section 31(6) and 31(7) of the Unclaimed Financial Assets Act are inoperable as the Cabinet Secretary is yet to gazette applicable daily rates for examination of records under section 31(3) of the Unclaimed Financial Assets Act.

j. A Declaration that prior to 2016, there being no regulations in place, the Unclaimed Financial Assets Authority Act had not been operationalized and the obligation therefore to file returns could only be complied with after 2016- the holders cannot therefore be penalized under section 20(1) as read with section 33(4) and (5) of the Act as compliance was not practically feasible.

k. A Declaration that an agent appointed by the Respondent under section 31(3) of the Unclaimed Financial Assets Act has no mandate to (a) compute penalties and interest payable by a holder/entity or (b) identify any other potential qualifying unclaimed assets not categorized by the Act for consideration by the Authority.

5. An order that pending the hearing and determination of the main judicial review proceedings herein, leave granted to apply for the orders of Declaration, Certiorari and Prohibition hereinabove do operate as a stay of the execution, implementation and/or enforcement as against the Applicant of the decision contained in the Respondent's letters dated the 23<sup>rd</sup> November 2020 and 20<sup>th</sup> January 2021 howsoever, particularly by the institution of any recovery proceedings or mechanisms [whether civil or criminal] or the issuance and/or implementation of any or any further decisions or notices to demand from the Applicant the payment of any sums due under the Unclaimed Financial Assets Act for the reporting period 1<sup>st</sup> November 2014 to 1<sup>st</sup> November 2019.

6. An order that pending the hearing and determination of the main judicial review proceedings herein, leave granted to apply for the orders of Declaration, Certiorari and Prohibition hereinabove do operate as a suspension of implementation of the following provisions of the Unclaimed Financial Assets Act: Section 52(5); Section 33(4); Section 33(5); section 31(6) and section 31(7).

3. The application is supported by the *ex parte* Applicants' Statutory Statement dated 4<sup>th</sup> February 2021, and an affidavit sworn on the same date by Stella Njunge, its Principal Officer. In summary, the *ex parte* Applicant claims that the Respondent's decision contained in the letter dated the 23<sup>rd</sup> of November 2020 and 20<sup>th</sup> of January 2021 on the payment to the Respondent of credit balances in account receivables, which are classified as unclaimed assets under section 5 of the Act, is illegal, *ultra vires*, unjust, unreasonable and is tainted with procedural unfairness for various reasons that are elucidated in the application.

4. The *ex parte* Applicant annexed copies of correspondence exchanged with the Respondent and Messrs. K.M Ndura & Associates Auditors; the said Auditor's reports; and of the Respondent's demand letters dated 23<sup>rd</sup> November 2020 and 20<sup>th</sup> January 2021.

### **The Determination**

5. I have considered the application dated 4<sup>th</sup> February 2021 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicant has demonstrated that this matter is urgent in light of the timelines imposed by the Respondent on the payment by the *ex parte* Applicant of the demanded sums of money.

6. On the orders sought by the *ex parte* Applicant for leave to commence judicial review proceedings, the applicable law is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

7. It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. In the present application, the *ex parte* Applicant has provided evidence of the impugned demands by the Respondent and has also averred to the grounds and reasons why it considers the Respondent's action to be unlawful.

8. To this extent I find that the *ex parte* Applicant has met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondent.

9. On the question of whether the said leave can operate as a stay of the impugned report, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. Order 53 Rule 1(4) of the Civil Procedure Rules provides as follows in this respect:

**“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”**

10. In **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision, and in various decisions by Kenyan Courts.

11. It has in this regard been held that where the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation. See in this regard the decisions in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006, Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995. Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR and James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR.**

12. In the present application the demanded sums of money have not been paid by the *ex parte* Applicant, and the implementation of the Respondent's demand is therefore amenable to stay. In addition, the *ex parte* Applicant is likely to suffer considerable financial prejudice before its grievance is heard and determined if the stay orders sought are not granted.

13. The *ex parte* Applicant has in addition to stay orders, also sought orders to suspend the operation of various sections of the Unclaimed Financial Assets Act, pending the hearing and determination of the substantive application. Various judicial decisions have emphasized in this regard that strong and cogent reasons and a constitutional basis must be shown before legislation can be suspended at an interlocutory stage. Therefore, the threshold that requires to be met in this regard is higher than that of an arguable or *prima facie* case.

14. It was in this regard held as follows in **Coalition for Reform and Democracy (CORD) & Another vs Republic of Kenya & Another [2015] eKLR:**

**“It is a very serious legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence and judicious wisdom. For the High Court to grant interim orders in this regard, I think one must at the interlocutory stage actually show that the operation of the legislative provision are a danger to life and limb at that very moment...It is my view the principle of presumption of Constitutionality of Legislation in (sic) imperative for any state that believes in democracy, the separation of powers and the Rule of Law in general. Further the courts to be able to suspend legislation during peace times where there is no national disaster or war, would in my view be interfering with the independence and supremacy of Parliament in its Constitutional duty of legislating law. I think that I shall hold the said views and that legislation should only be impugned in any manner only where it has been proven to be unconstitutional, null and void. Conservancy orders to suspend operation of statutes, statutory provisions or even Regulations should be wholly avoided except where the national interest demand and the situation is certain...I am still of the view that “there is no place for conservatory or interim order in petitions, which seek to nullify or declare legislation/statutes unconstitutional, null and void.” It is even more premature at this stage where the application has not been heard or is not being heard to seek such conservatory orders. The applications must be heard first.”**

15. Likewise, Majanja J. expressed himself as follows in **Susan Wambui Kaguru & Ors vs. Attorney General & Another (2012) eKLR:**

**“I have given thought to the arguments made and once again I reiterate that every statute passed by the legislature enjoys a presumption of legality and it is the duty of every Kenyan to obey the very law that are passed by our representatives in accordance with their delegated sovereign authority. The question for the court is to consider whether these laws are within the four corners of the Constitution. No doubt serious legal arguments have been advanced and I think any answer to them must await full argument and consideration by the court. I cannot at this stage make an interim declaration which would effectively undo the legislative will unless there are strong and cogent reasons to do so.”**

16. It must however be clarified that once cogent reasons have been established, this Court has power to suspend impugned provisions of a statute as held by the Court of Appeal in **Attorney General & another vs Coalition for Reform and Democracy & 7 others, [2015] eKLR** in which the Court stated that it is not in the interest of justice to enact or implement a law that may violate the Constitution and in particular the Bill of Rights.

17. In the present application it is notable that the Unclaimed Financial Assets Act has been in operation since 2011, and various actions and proceedings are likely to have been undertaken pursuant to the sections that are sought to be suspended. The orders sought are therefore likely to affect persons who are not parties to this case, and who will not have an opportunity to be heard. It is also notable in this respect that three necessary parties who will be directly affected by the orders sought by the *ex parte* Applicant, namely the Cabinet Secretary for Treasury, the Attorney General and the National Assembly, being the public offices in charge of public finance and legislation, have not been joined as parties herein.

18. Lastly, it is not evident what immediate prejudice will be caused to the *ex parte* Applicant and the public in terms of threat to life and limb, by the impugned provisions of the Unclaimed Financial Assets Act.

### **The Disposition**

19. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 4<sup>th</sup> February 2021 is found to be merited only to the extent of the following orders:

**I. The *ex parte* Applicants' Chamber Summons application dated 4<sup>th</sup> February 2021 is hereby certified as urgent, and that the same is hereby admitted to hearing *ex parte* at the first instance.**

**II. The Cabinet Secretary Treasury, the Clerk of the National Assembly and the Attorney General are joined as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties respectively in this suit.**

**III. The *ex parte* Applicant is granted leave to apply for an order of Certiorari to remove into the High Court and quash the demand letter dated 23rd November 2020 issued against the Applicant, demanding the payment of Kshs. 138,250,058.00 being unclaimed assets and Kshs. 3,926,751.00 being audit fees.**

**IV. The *ex parte* Applicant is granted leave to apply for an order of Certiorari to remove into the High Court and quash the findings of the audit report prepared and published by Messrs. K.M. Ndura & Associates on a date unknown to the Applicant in so far as it returned a finding that (1) the Applicant was holding identified unclaimed assets under section 5 of the Unclaimed Financial Assets Act whose value totaled Kshs. 138,250,058.00, (2) penalties and interest payable by the Applicant under the provisions of sections 33 of the Unclaimed Financial Assets Act was a sum of Kshs. 312,793,838.00.**

**V. The *ex parte* Applicant is granted leave to apply for an order of Prohibition directed at the Respondent prohibiting and restraining the Respondent whether acting directly or through any of their agents, employees and/or officers from issuing, executing, enforcing and/or implementing any or any further decisions, demands or notices as against the Applicants based on the Messrs. K.M. Ndura & Associates Audit Report.**

**VI. The *ex parte* Applicant is granted leave to apply for a Declaration that the provisions of section 5 of the Unclaimed Financial Act do not apply to the asset described in the audit report of Messrs. K.M Ndura & Associates as "credit balances on accounts receivable" (being premium receivables).**

**VII. The *ex parte* Applicant is granted leave to apply for a Declaration that the provisions of section 5 of the Unclaimed Financial Act do not apply to the asset described in the audit report of Messrs. K.M Ndura & Associates as "credit balances in paid claims register".**

**VIII. The *ex parte* Applicant is granted leave to apply for a Declaration that the provisions of section 52(5) of the Unclaimed Financial Assets Act is unconstitutional, and to the extent of the unconstitutionality, null and void .**

**IX. The *ex parte* Applicant is granted leave to apply for a Declaration that in assessing the interest and penalties payable by the Applicants [or any other person or holder] under the provisions of sections 33(4) and 33(5) of the Unclaimed Financial Assets Act, the Respondent has a constitutional, statutory, and legal duty and obligation to ensure that the 'willful' threshold has been met and also, consider relevant mitigating factors and give reasons for applying any penalty [highest or lowest] provided for in law.**

**X. The *ex parte* Applicant is granted leave to apply for a Declaration that there is no obligation under the provisions of section 20(1) of the Unclaimed Financial Assets Act for an entity/person which is not holding assets presumed abandoned and subject to the custody of the Authority to file a report with the Authority.**

**XI. The *ex parte* Applicant is granted leave to apply for a Declaration that the provisions of section 31(6) and 31(7) of the Unclaimed Financial Assets Act are inoperable as the Cabinet Secretary is yet to gazette applicable daily rates for examination of records under section 31(3) of the Unclaimed Financial Assets Act.**

**XII. The *ex parte* Applicant is granted leave to apply for a Declaration that prior to 2016, there being no regulations in place, the Unclaimed Financial Assets Authority Act had not been operationalized and the obligation therefore to file returns could only be complied with after 2016- the holders cannot therefore be penalized under section 20(1) as read with section 33(4)**

and (5) of the Act as compliance was not practically feasible.

XIII. The *ex parte* Applicant is granted leave to apply for a Declaration that an agent appointed by the Respondent under section 31(3) of the Unclaimed Financial Assets Act has no mandate to (a) compute penalties and interest payable by a holder/entity or (b) identify any other potential qualifying unclaimed assets not categorized by the Act for consideration by the Authority.

XIV. The leave granted herein to apply for the orders of Declaration, Certiorari and Prohibition hereinabove shall operate as a stay of the execution, implementation and/or enforcement as against the Applicant of the decision contained in the Respondent's letters dated the 23rd November 2020 and 20th January 2021 howsoever, including by the institution of any recovery proceedings or mechanisms whether civil or criminal, pending the hearing and determination of the substantive Notice of Motion or until further orders of this Court.

XV. Prayer 6 of the *ex parte* Applicants' Chamber Summons application dated 4<sup>th</sup> February 2021 seeking an order that the leave granted herein to apply for the orders of Declaration, Certiorari and Prohibition operates as a suspension of implementation of Section 52(5); Section 33(4); Section 33(5); section 31(6) and section 31(7) of the Unclaimed Financial Assets Act is declined.

XVI. The costs of the *ex parte* Applicants' Chamber Summons application dated 4<sup>th</sup> February 2021 shall be in the cause.

XVII. The *ex parte* Applicant shall file and serve the Respondent and Interested Parties with (i) the substantive Notice of Motion (ii) the Chamber Summons dated 4<sup>th</sup> February 2021 and its supporting documents, (iii) a copy of this ruling, and (iv) a hearing notice, within twenty-one (21) days from today's date.

XVIII. The Respondent and Interested Parties are granted leave to file their responses to the substantive Notice of Motion within twenty-one (21) days from the date of service.

XIX. This suit shall be mentioned on 23<sup>rd</sup> April 2021 for further directions.

XX. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and the *ex parte* Applicant's substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

XXI. The parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) and [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XXII. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XXIII. The parties shall also be required to file their respective affidavits evidencing service in the Judiciary's e-filing system.

XXIV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 23<sup>rd</sup> April 2021.

XXV. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the *ex parte* Applicant by electronic mail by close of business on Thursday, 12th February 2021.

XXVI. Parties shall be at liberty to apply.

20. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 8<sup>TH</sup> DAY OF FEBRUARY 2021

P. NYAMWEYA

JUDGE