



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. MISC E008 OF 2021**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE CABINET SECRETARY, MINISTRY OF AGRICULTURE LIVESTOCK,**

**FISHERIES AND CO-OPERATIVES.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY STATE DEPARTMENT LIVESTOCK....3<sup>RD</sup> RESPONDENT**

**THE CHIEF EXECUTIVE OFFICER KENYA VETERINARY BOARD.....4<sup>TH</sup> RESPONDENT**

**EX PARTE APPLICANTS:**

**1. BENSON ODUOR AMEDA**

**2. QUEEREENUSE PACHO OLUOCH**

**RULING**

**The Application**

1. On 19<sup>th</sup> January 2021, this Court directed that the Chamber Summons dated 18<sup>th</sup> January 2021 filed by Benson Oduor Ameda, and Queereenuse Pacho Oluoch, the 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants herein respectively, be mentioned on 22<sup>nd</sup> February 2021 for directions as to its status, after the Court noted that the said *ex parte* Applicants had filed a similar application in **NRB H.C JR Misc. E004 OF 2021**.

2. The *ex parte* Applicants have now filed an application by way of Notice of Motion dated 27<sup>th</sup> January 2021 seeking the following orders:

**1. THAT this Application be certified urgent and the same be heard ex parte in the first instance.**

**2. THAT this Court be pleased to direct that the file be placed before Hon. Lady Justice P. Nyamweya or the Duty Court for review of the court directions dated 19th January 2021.**

**3. THAT this Court be pleased to allow the application dated 18th January 2021 as prayed.**

**4. THAT this Court be pleased to make such further orders as are necessary for the ends of justice to be served.**

**5. THAT the costs of the application be provided for.**

3. The said application is supported by an affidavit sworn on 27<sup>th</sup> January 2021 by the 1<sup>st</sup> *ex parte* Applicant, and the main ground for the application is that the directions given on 19<sup>th</sup> January 2021 were informed by the existence of application in **NRB H.C JR Misc. E004 OF 2021**. However, that the present proceedings were instituted on the confirmation that the application in **NRB H.C JR Misc. E004 OF 2021**

had been withdrawn, which fact may not have been brought to the attention of the Court in good time. The *ex parte* Applicants annexed the Notice of Withdrawal of Suit filed in **NRB H.C JR Misc. E004 OF 2021**.

### **The Determination**

4. The applicable law for setting aside or review of a judgment or decree of the court is section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides as follows:

**“Any person who considers himself aggrieved—**

**(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”**

5. Order 45 Rule 1 of the Civil Procedure Rules elaborates on the grounds on which a judgment or decree can be set aside as follows:

**“ (1) Any person considering himself aggrieved—**

**(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”**

6. I have in this regard perused the Court record in **NRB H.C JR Misc. E004 OF 2021** and note that the Notice of Withdrawal dated 19<sup>th</sup> January 2021 was filed therein on 20<sup>th</sup> January 2021, a day after this Court gave directions in this matter. There is thus new evidence that was not in this Court’s knowledge at the time of making directions on 19<sup>th</sup> January 2021, and that has resulted in an error on the face of the record, and the said directions are therefore amenable to review and variation.

7. In reviewing the said directions, it is notable that the *ex parte* Applicants were seeking the following orders in their Chamber Summons application dated 18<sup>th</sup> January 2021, seeking the following orders:

**1. THAT this application be certified as urgent and service be dispensed with in the first instance.**

**2. THAT the ex parte Applicants herein be granted leave to apply for an order of Certiorari to remove into the High Court for purposes of it being quashed the Gazette Notice No. 14 dated 6th January, 2021 by the 1st Respondent purporting to revoke the appointment of Dr Christopher H.Wanga, Dr Jafred M.A. Kitaa, Mr Paul Kariuki Ndungu, Mr Benson Oduor Ameda, Mr Queereenuse Pacho as members of Kenya Veterinary Board .**

**3. THAT the ex parte Applicants herein be granted leave to apply for an order of prohibition against the 1st Respondent prohibiting him from interfering with the elections of the members to the Kenya Veterinary Board scheduled to be completed before 20th March 2021, including the process and outcome or carrying out a selective gazetteement or appointment of the elected representatives contrary to the provisions of the Veterinary Surgeons and Veterinary Paraprofessionals Act and Regulations.**

**4. THAT the ex parte Applicants herein be granted leave to apply for an order of prohibition against the 1st Respondent prohibiting him from interfering with the term of office and statutory mandate of Dr Christopher H. Wanga, Dr Jafred M.A. Kitaa, Mr Paul Kariuki Ndungu, Mr Benson Oduor Ameda and Mr Queereenuse Pacho Oluoch as members of the Board of Directors of the Kenya Veterinary Board.**

**5. THAT the ex parte Applicants herein be granted leave to apply for an order of prohibition against the 1st Respondent prohibiting him from, contrary to the provisions of the Veterinary Surgeons and Veterinary Paraprofessionals Act 2011 and Regulations, interfering with staff, Members of the Board of Directors and the operations of the Kenya Veterinary Board as they work towards smooth completion of the term of the current Board of Directors by 20th March 2021.**

**6. THAT the leave granted to apply for the orders of Certiorari and prohibition do operate as stay of implementation of Gazette Notice No.14 dated 6th January, 2021 purporting to revoke the appointment of Dr Christopher H. Wanga, Dr Jafred M.A. Kitaa, Mr Paul Kariuki Ndungu, Mr Benson Oduor Ameda, Mr Queereenuse Pacho and as members of Kenya Veterinary Board and interference with their smooth completion of term of the current Board of Directors including carrying out the impending elections under section 4(1)(D and (g) of the Veterinary Surgeons and Veterinary Paraprofessionals Act 2011 by 20th March 2021.**

**7. THAT the costs of the application be provided for.**

8. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 18<sup>th</sup> January 2021, and a verifying affidavit sworn on the same date by the 1<sup>st</sup> *ex parte* Applicant. In summary, the *ex parte* Applicants claim that is that they were appointed as members of the Kenya Veterinary Board of Directors under section 4(1)(g) of the Veterinary Surgeons and Veterinary Paraprofessionals Act for a term of three years that lapses in March 2021. However, that in total disregard to the law, and in abuse of powers of the office of the Cabinet Secretary, the 1<sup>st</sup> Respondent through *Gazette Notice* No. 14 of dated 6th January 2021 and published on 8th January 2021 purported to revoke the appointment of Dr Christopher H. Wanga Dr Jafred M.A. Kitaa, Mr Paul Kariuki Ndungu, Mr Benson Oduor Ameda and Mr Queereenuse Pacho being some of the Members of the Kenya Veterinary Board.

9. The *ex parte* Applicants are also apprehensive that the 1<sup>st</sup> Respondent will interfere with the elections of members of the Kenya Veterinary Board scheduled to be conducted within three months, and that they risk being locked out from presenting their candidature summarily with no recourse following their revocation under the impugned *Gazette Notice* thereby disenfranchising them.

10. The 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants annexed a number of documents in support of their application including copies of *Gazette Notice* No. 14 of dated 6th January 2021, of the upcoming elections of members of the Kenya Veterinary Board, and of relevant sections of the Veterinary Surgeons and Veterinary Paraprofessionals Regulations of 2013.

11. Upon careful consideration of the application dated 18<sup>th</sup> January 2021 and the reasons offered in support of the urgency, I am satisfied that the 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants have demonstrated that this matter is urgent, and that the same ought to be heard on a priority basis, in light of the imminent election of new members of the Kenya Veterinary Board.

12. On the orders sought by the 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants 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.

13. 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 a cursory perusal of the evidence before the court, and make a decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) 1 WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

14. In the present application, the *ex parte* Applicants have provided evidence of the impugned *gazette notice*, and advanced the grounds why they consider the 1<sup>st</sup> Respondent's decision to be illegal. To this extent I find that the 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants have met the threshold of an arguable case, and are therefore entitled to the leave sought to commence judicial review proceedings against the Respondents.

15. 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.”**

16. 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.

17. The main factor is whether or not the decision or action sought to be stayed has been fully implemented. It was thus held in **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. A similar decision was made by Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** .

18. This factor was also discussed in **R (H). vs Ashworth Special Hospital Authority (supra)** where Dyson L.J. held as follows:

**“As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.”**

19. It therefore follows that were 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.

20. In this regard, it is not evident what implementation measures will be required to implement the decision by the 1<sup>st</sup> Respondent revoking

the appointment of the *ex parte* Applicants. In addition, there is need to give all the parties an opportunity to indicate what prejudice if any, they may suffer if stay is granted or otherwise.

### **The Orders**

21. In light of the foregoing observations and findings, the *ex parte* Applicants' Notice of Motion dated 27<sup>th</sup> January 2021 and Chamber Summons dated 18<sup>th</sup> January 2021 are found to be merited to the extent of the following orders:

**I. The 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants' Notice of Motion application dated 27<sup>th</sup> January 2021 is certified urgent and admitted to hearing *ex parte*.**

**II. Prayers 2 and 3 of the 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants' Notice of Motion application dated 27<sup>th</sup> January 2021 are allowed only to the extent of the orders granted herein today, and the directions granted herein on 19<sup>th</sup> January 2021 are hereby reviewed and varied to the extent of the said orders.**

**III. There shall be no order as to the costs of the *ex parte* Applicants' Notice of Motion application dated 27<sup>th</sup> January 2021.**

**IV. The 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants' Chamber Summons application dated 18<sup>th</sup> January 2021 is certified urgent and admitted to hearing *ex parte* in the first instance.**

**V. The 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants are granted leave to apply for an order of Certiorari to remove into the High Court for purposes of it being quashed the Gazette Notice No. 14 dated 6th January, 2021 by the 1<sup>st</sup> Respondent purporting to revoke the appointment of Dr Christopher H.Wanga, Dr Jafred M.A. Kitaa, Mr Paul Kariuki Ndungu, Mr Benson Oduor Ameda, Mr Queereenuse Pacho as members of Kenya Veterinary Board.**

**VI. The 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants are granted leave to apply for an order of prohibition against the 1<sup>st</sup> Respondent prohibiting him from interfering with the functioning, the membership and/or operations of the Kenya Veterinary Board.**

**VII. The 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants are granted leave to apply for an order of prohibition against the 1<sup>st</sup> Respondent prohibiting him from interfering with the elections of the members to the Kenya Veterinary Board scheduled to be completed before 20th March 2021, including the process and outcome or carrying out a selective gazettelement or appointment of the elected representatives contrary to the provisions of the Veterinary Surgeons and Veterinary Paraprofessionals Act and Regulations.**

**VIII. The 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants are granted leave to apply for an order of prohibition against the 1<sup>st</sup> Respondent prohibiting him from interfering with the term of office and statutory mandate of Dr Christopher H. Wanga, Dr Jafred M.A. Kitaa, Mr Paul Kariuki Ndungu, Mr Benson Oduor Ameda and Mr Queereenuse Pacho Oluoch as members of the Board of Directors of the Kenya Veterinary Board.**

**IX. The 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants are granted leave to apply for an order of prohibition against the 1st Respondent prohibiting him from, contrary to the provisions of the Veterinary Surgeons and Veterinary Paraprofessionals Act 20 1 and Regulations, interfering with staff, Members of the Board of Directors and the operations of the Kenya Veterinary Board as they work towards smooth completion of the term of the current Board of Directors by 20<sup>th</sup> March 2021.**

**X. Prayer (6) of the Chamber Summons dated 18<sup>th</sup> January 2021 seeking orders that the grant of leave herein do operate as a stay of implementation of Gazette Notice No.14 dated 6th January, 2021 purporting to revoke the appointment of Dr Christopher H. Wanga, Dr Jafred M.A. Kitaa, Mr Paul Kariuki Ndungu, Mr Benson Oduor Ameda, Mr Queereenuse Pacho and as members of Kenya Veterinary Board and interference with their smooth completion of term of the current Board of Directors including carrying out the impending elections under section 4(1)(D and (g) of the Veterinary Surgeons and Veterinary Paraprofessionals Act 2011 by 20<sup>th</sup> March 2021, shall be heard at a virtual *inter partes* hearing to be held on 22<sup>nd</sup> February 2021.**

**XI. The 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicant shall file and serve the Respondents with (i) the substantive Notice of Motion, (ii) the Chamber Summons dated 18<sup>th</sup> January 2021 and skeletal submissions on prayer (6) thereof, (iii) a copy of this ruling, and (v) a hearing notice, within ten (10) days from today's date.**

**XII. Upon being served with the said pleadings and documents, the Respondents shall be required to file their responses to the substantive Notice of Motion, and their response to and skeletal submissions on prayer (6) of the Chamber Summons dated 18<sup>th</sup> January 2021 within ten (10) days from the date of service.**

**XIII. 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 determine the prayer (6) of the Chamber Summons dated 18<sup>th</sup> January 2021 on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.**

**XIV. All 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).

XV. 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).

XVI. The parties shall also be required to file and send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XVII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for a virtual hearing on 22<sup>nd</sup> February 2021 before Hon. Mr. Justice Ngaah, as this Court will be on leave, and in light of the impending elections that are the subject matter of this application.

XVIII. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant by electronic mail by close of business on Thursday, 4<sup>th</sup> February 2021.

XIX. Parties shall be at liberty to apply.

22. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 1<sup>ST</sup> DAY OF FEBRUARY 2021

P. NYAMWEYA

JUDGE