



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. MISC E073 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA MEDICAL PRACTITIONERS

AND DENTIST BOARD.....1ST RESPONDENT

THE DISCIPLINARY AND ETHICS

COMMITTEE.....2ND RESPONDENT

AND

STEPHEN ANYANGA WABUTI (On behalf of

LEVITICUSMORE BHURI ANYANGA).....INTERESTED PARTY

EX PARTE APPLICANTs:

DIVINE WORD PARISH HEALTH CENTRE

ANDERSON KIPCHUMBA KIGAI

GRACE APIYO OTIENO

RULING

1. The *ex parte* Applicants herein have moved this Court in an application brought by way of Chamber Summons dated 13th May 2021, wherein they are seeking the following orders:

1. THAT this application be certified as urgent and be heard ex parte in the first instance.

2. THAT this Court be pleased to grant leave to the Applicants herein Divine Word Parish Health Centre, Anderson Kipchumba Kigai and Grace Apiyo Otieno to institute Judicial Review proceedings in the nature of Certiorari to bring to this court and quash the proceedings and Ruling by the Respondents as delivered in PIC case no. 48 of 2018.

3. THAT the grant of leave does operate as a stay of the execution of the Ruling of the Respondents and Orders issued therein as delivered in PIC case no. 48 of 2018.

4. THAT the Applicants be at liberty to apply to the Court for all necessary and or consequential orders that the Court may deem fit to grant.

5. THAT the costs of this Application be provided for.

2. The said application is supported by a statutory statement dated 13th May 2021, and a verifying affidavit sworn on the same date by Maurice Sawanda, the Deputy Administrator of the *ex parte* Applicants. The main ground for the application is that the 2nd Respondent heard and gave a ruling dated 7th April 2021 in PIC Case No. 48 of 2018 on a complaint by the Interested Party against the 1st *ex parte* Applicant. However, that at the time of lodging of the said complaint by the Interested Party on 29th August, 2018, the Respondents did not have the jurisdiction and disciplinary powers over health institutions, as the said jurisdiction and powers were only conferred on the Respondents by the Health Laws (Amendment) Act of 2019 which came into force on 17th May, 2019.

3. The applicable law on leave to commence judicial review proceedings 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.

4. 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 it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave.

5. In the present application, the *ex parte* Applicants have provided evidence of the complaint lodged by the Interested Party and the impugned ruling made thereon by the Respondents in PIC Case No. 48 of 2018, and averred as to why they consider the actions of the Respondents to be illegal. To this extent I find that the *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 Respondent.

6. 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.”

7. I am guided by the exposition on the purpose of a stay in **R (H.) vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, where 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, and to ensure that a party who is eventually successful in his or her challenge is not denied the full benefit of the success.

8. 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. It has in this regard been held 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.

9. These positions were also explained in 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**.

10. In the present application, the orders given by the 1st Respondent in the impugned decision in PIC Case No 48 of 2018 requires payment of compensation and penalties by the 1st *ex parte* Applicant, and inquiries on the conduct of the 2nd and 3rd *ex parte* Applicants. The implementation of the 1st Respondent's decision is therefore not only amenable to stay, but the *ex parte* Applicants' application will also be rendered nugatory if the stay order is not granted. The stay orders are therefore merited to this extent.

The Disposition

11. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 13th May 2021 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants' Chamber Summons dated 13th May 2021 is certified urgent and is admitted to hearing *ex parte* in the first instance.

II. The *ex parte* Applicants herein, Divine Word Parish Health Centre, Anderson Kipchumba Kigai and Grace Apiyo Otieno, are granted leave to commence proceedings in the nature of judicial review against the Respondents for an order of Certiorari to bring to this court and quash the proceedings and Ruling by the Respondents as delivered in PIC case no. 48 of 2018.

III. The grant of leave herein shall operate as a stay of the execution and implementation of the ruling of the Respondents and Orders issued therein as delivered on 7th April 2021 in PIC case no. 48 of 2018.

IV. The costs of the Chamber Summons dated 13th May 2021 shall be in the cause.

V. The *ex parte* Applicants shall file and serve the Respondents with the substantive Notice of Motion, and shall also serve the Respondent with the Chamber Summons dated 13th May 2021, a copy of this ruling, and a mention notice, within fourteen (14) days from today's date.

VI. Upon being served with the said pleadings and documents, the Respondents shall be required to file their responses to the substantive Notice of Motion within fourteen (14) days from the date of service by the *ex parte* Applicant.

VII. This matter shall be mentioned by email on 22nd June 2021 for further directions.

VIII. 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 *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.

IX. All the parties shall file their pleadings 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 and asunachristine51@gmail.com.

X. 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 with copies to asunachristine51@gmail.com.

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

XII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention by email on 22nd June 2021.

XIII. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicants by electronic mail by close of business on Monday, 17th May 2021.

XIV. Parties shall be at liberty to apply.

12. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF MAY 2021

P. NYAMWEYA

JUDGE