



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E058 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

BOARD OF DIRECTORS, ROYAL NAIROBI CLUB.....RESPONDENT

CAPTAIN, ROYAL NAIROBI CLUB.....RESPONDENT

DR. CONSTATINE BARASA, MEMBER AND DIRECTOR- FINANCE,

ROYAL NAIROBI CLUB.....RESPONDENT

AND

KAAB INVESTMENTS LIMITED.....INTERESTED PARTY

EX PARTE APPLICANT: CHRISPINE OKEKE

RICHARD OGWENOH OYARE

RULING

The Application

1. The *ex parte* Applicant herein, has filed an application by way of a Chamber Summons dated 22nd April 2021, seeking the following orders:

a) The Applicant be granted leave to apply for,

(i) AN ORDER OF CERTIORARI to remove to this Honourable Court to be quashed the decision of the 2nd Respondent in purporting to suspend the Applicants for one (1) month from golfing activities in the club.

(ii) AN ORDER OF MANDAMUS compelling the Respondents to immediately remove and/or expunge from the Applicant's records at the club any purported disciplinary records as per the letter from the 2nd Respondent dated 12th February 2021.

(iii) AN ORDER OF MANDAMUS compelling the Respondents to issue an official, unequivocal and public apology read out by the 2nd Respondent during the next four (4) club night presentations.

(iv) AN ORDER OF MANDAMUS compelling the Respondents to publish a copy of the said apology to the Applicants be placed and maintained on the Respondents' Notice Boards at the club for a period of 30 (thirty) days.

(v) This Honourable court be pleased to order the Respondents to compensate the Applicants for the harm caused to their reputation amongst their peers at the club.

b) The grant of leave herein does operate as a stay of implementation and/or enforcement of the Respondent's decisions sought to be impugned, pending hearing and determination of the motion for judicial review.

c) Costs.

2. The grounds for the application are stated in the *ex parte* Applicants' statutory statement dated 22nd April 2021, and a verifying affidavits sworn on the same date by the 1st and 2nd *ex parte* Applicants respectively.

3. In summary, the *ex parte* Applicants averred that they received a letter on 12th February 2021 from the 2nd Respondent, which suspended them for a period of one (1) month from golfing activities in the club effective from 16th February 2021 to 16th March 2021. Further, that the *ex parte* Applicants were never served with any complaint by the 2nd Respondent, who alleged that the same was filed by the 3rd Respondent, and were never given notice of any disciplinary hearing to be held. The *ex parte* Applicants stated that they wrote to the 2nd Respondent seeking to appeal the decision, but have not received any communication thereto to date.

4. The *ex parte* Applicants therefore claim that the Respondents acted illegally, irrationally and unreasonably in failing to give any valid reasons for the decision made on 12th February 2021, and that the 2nd Respondent acted *ultra vires* the relevant statute.

5. The *ex parte* Applicants annexed copies of the 2nd Respondent's impugned letter dated 12th February 2021, and of correspondence with the said Respondent.

The Determination

6. I have considered the application dated 22nd April 2021 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicants have demonstrated that this matter is urgent. This for reasons of the harm likely to be caused to the *ex parte* Applicants by the Respondent's impugned action.

7. On the orders sought by the *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.

8. 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. It was explained by Lord Bingham in this respect 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.

9. In the present application, the *ex parte* Applicants have provided evidence of the impugned decision made by the 2nd Respondent on 12th February 2021, and have averred as to the grounds and reasons why they consider the Respondent's decision 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 Respondents.

10. On the question of whether the said leave can operate as a stay of the summons, 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.”

11. 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.

12. 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.

13. 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.

14. In the present application, I note that the letter suspended the *ex parte* Applicants for a period of 1 month from 16th February 2021 to 16th March 2021. The said decision has therefore been fully implemented, and there is nothing left to stay. The stay orders are therefore not merited for this reason.

The Disposition

15. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 22nd April 2021 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants' Chamber Summons application dated 22nd April 2021 is hereby certified as urgent, and is hereby admitted for hearing *ex parte* in the first instance.

II. The *ex parte* Applicant is granted leave to apply for an order of certiorari to remove to this Court to be quashed the decision of the 2nd Respondent in purporting to suspend the Applicants for one (1) month from golfing activities in the club.

III. The *ex parte* Applicant is granted leave to apply for an order of Mandamus compelling the Respondents to immediately remove and/or expunge from the Applicant's records at the club any purported disciplinary records as per the letter from the 2nd Respondent dated 12th February 2021.

IV. The *ex parte* Applicant is granted leave to apply for an order of mandamus compelling the Respondents to issue an official, unequivocal and public apology read out by the 2nd Respondent during the next four (4) club night presentations.

V. The *ex parte* Applicant is granted leave to apply for an order of Mandamus compelling the Respondents to publish a copy of the said apology to the Applicants be placed and maintained on the Respondents' Notice Boards at the club for a period of 30 (thirty) days.

VI. The *ex parte* Applicant is granted leave to apply for an order of compensation against the Respondents to compensate the Applicants for the harm caused to their reputation amongst their peers at the club.

VII. The costs of the *ex parte* Applicant's Chamber Summons application dated 22nd April 2021 shall be in the cause.

VIII. The *ex parte* Applicant shall file and serve the Respondent and Interested Party with (i) the substantive Notice of Motion (ii) the Chamber Summons dated 22nd April 2021 and its supporting documents, (iii) a copy of this ruling, and (v) a hearing notice, within fourteen (14) days from today's date.

IX. Upon being served with the said pleadings and documents, the Respondents and Interested Party shall be required to file their responses to the substantive Notice of Motion within fourteen (14) days from the date of service.

X. A virtual hearing of the *ex parte* Applicant's substantive Notice of Motion shall be held on 28th June 2021 at 3.00pm.

XI. 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.

XII. 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 and asunachristine51@gmail.com.

XIII. 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.

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

XV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for a virtual hearing on 28th June 2021 at 3.00pm and shall send the parties an electronic link for the mention.

XVI. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the *ex parte* Applicants by electronic mail by close of business on Monday, 10th May 2021.

XVII. Parties shall be at liberty to apply.

16. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF MAY 2021

P. NYAMWEYA

JUDGE