



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E060 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF PROHIBITION AND MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE SENATE OF THE REPUBLIC OF KENYA1ST RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF MOMBASA.....2ND RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF KWALE.....3RD RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF KILIFI.....4TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF TANA RIVER.....5TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF LAMU.....6TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF TAITA TAVETA.....7TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF GARISSA.....8TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF WAJIR.....9TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF MANDERA.....10TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF MARSABIT.....11TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF ISIOLO.....12TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF MERU.....13TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF

THARAKA NITHI.....14TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF EMBU.....15TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF KITUL.....16TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF MACHAKOS.....17TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF MAKUENI.....18TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF NYANDARUA....19TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF NYERI.....20TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF KIRINYAGA.....21ST RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF MURANG'A.....22ND RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF KIAMBU.....23RD RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF TURKANA.....24TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF WEST POKOT.....25TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF SAMBURU.....26TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF TRANS NZOIA.....27TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF UASIN GISHU.....28TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF ELGEYO/MARAKWET.....29TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF NANDI.....30TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF BARINGO.....31ST RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF LAIKIPIA.....32ND RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF NAKURU.....33RD RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF NAROK.....34TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF KAJIADO.....35TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF KERICHO.....36TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF BOMET.....37TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF KAKAMEGA..38TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF VIHIGA.....39TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF BUNGOMA.....40TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF BUSIA41ST RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF SIAYA.....42ND RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF KISUMU.....43RD RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF HOMA BAY...44TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF MIGORI.....45TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF KISIL.....46TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF NYAMIRA.....47TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF NAIROBI.....48TH RESPONDENT

COUNTY ASSEMBLY OF MOMBASA.....49TH RESPONDENT

COUNTY ASSEMBLY OF KWALE.....50TH RESPONDENT

COUNTY ASSEMBLY OF KILIFI.....51ST RESPONDENT

COUNTY ASSEMBLY OF TANA RIVER.....52ND RESPONDENT

COUNTY ASSEMBLY OF LAMU.....53RD RESPONDENT

COUNTY ASSEMBLY OF TAITA TAVETA.....54TH RESPONDENT

COUNTY ASSEMBLY OF GARISSA.....55TH RESPONDENT

COUNTY ASSEMBLY OF WAJIR.....56TH RESPONDENT

COUNTY ASSEMBLY OF MANDERA.....57TH RESPONDENT

COUNTY ASSEMBLY OF MARSABIT.....58TH RESPONDENT

COUNTY ASSEMBLY OF ISIOLO.....59TH RESPONDENT

COUNTY ASSEMBLY OF MERU.....60TH RESPONDENT

COUNTY ASSEMBLY OF THARAKA NITHI.....61ST RESPONDENT

COUNTY ASSEMBLY OF EMBU.....62ND RESPONDENT

COUNTY ASSEMBLY OF KITUI.....63RD RESPONDENT

COUNTY ASSEMBLY OF MACHAKOS.....64TH RESPONDENT

COUNTY ASSEMBLY OF MAKUENI.....65TH RESPONDENT

COUNTY ASSEMBLY OF NYANDARUA.....66TH RESPONDENT

COUNTY ASSEMBLY OF NYERI67TH RESPONDENT

COUNTY ASSEMBLY OF KIRINYAGA.....68TH RESPONDENT

COUNTY ASSEMBLY OF MURANG'A.....69TH RESPONDENT

COUNTY ASSEMBLY OF KIAMBU.....70TH RESPONDENT

COUNTY ASSEMBLY OF TURKANA.....71ST RESPONDENT

COUNTY ASSEMBLY OF WEST POKOT.....72ND RESPONDENT

COUNTY ASSEMBLY OF SAMBURU.....	73 RD RESPONDENT
COUNTY ASSEMBLY OF TRANS NZOIA.....	74 TH RESPONDENT
COUNTY ASSEMBLY OF UASIN GISHU.....	75 TH RESPONDENT
COUNTY ASSEMBLY OF ELGEYO/MARAKWET.....	76 TH RESPONDENT
COUNTY ASSEMBLY OF NANDI.....	77 TH RESPONDENT
COUNTY ASSEMBLY OF BARINGO.....	78 TH RESPONDENT
COUNTY ASSEMBLY OF LAIKIPIA.....	79 TH RESPONDENT
COUNTY ASSEMBLY OF NAKURU.....	80 TH RESPONDENT
COUNTY ASSEMBLY OF NAROK.....	81 ST RESPONDENT
COUNTY ASSEMBLY OF KAJIADO.....	82 ND RESPONDENT
COUNTY ASSEMBLY OF KERICHO.....	83 RD RESPONDENT
COUNTY ASSEMBLY OF BOMET.....	84 TH RESPONDENT
COUNTY ASSEMBLY OF KAKAMEGA.....	85 TH RESPONDENT
COUNTY ASSEMBLY OF VIHIGA	86 TH RESPONDENT
COUNTY ASSEMBLY OF BUNGOMA	87 TH RESPONDENT
COUNTY ASSEMBLY OF BUSIA	88 TH RESPONDENT
COUNTY ASSEMBLY OF SIAYA.....	89 TH RESPONDENT
COUNTY ASSEMBLY OF KISUMU.....	90 TH RESPONDENT
COUNTY ASSEMBLY OF HOMA BAY''.....	91 ST RESPONDENT
COUNTY ASSEMBLY OF MIGORI.....	92 ND RESPONDENT
COUNTY ASSEMBLY OF KISIL.....	93 RD RESPONDENT
COUNTY ASSEMBLY OF NYAMIRA	94 TH RESPONDENT
COUNTY ASSEMBLY OF NAIROBI.....	95 TH RESPONDENT

AND

COUNCIL OF GOVERNORS.....	1 ST INTERESTED PARTY
ATTORNEY GENERAL.....	2 ND INTERESTED PARTY

EXPARTE:

CHARLES ONGARO KIAGE.....	1 ST APPLICANT
CPA BENSON ORINA BOSIRE.....	2 ND APPLICANT
RICHARD OSEKO OGETO.....	3 RD APPLICANT

RULING

The Application

1. The *ex parte* Applicants herein are Kenyan citizens, and they have filed an application by way of a Chamber Summons dated 5th May 2021, seeking the following orders:

1. The matter be certified as urgent;

2. The Notice to the Registrar be dispensed with in the first instant;

3. The Court be pleased to grant leave to the ex-parte applicants to apply for Judicial Review to prohibit the 1st Respondent from summoning the Chief Executive Officers of the 47 County Government Executive to appear before it as from 3rd May 2021;

4. The Court be pleased to grant leave to the ex-parte applicants apply for Judicial Review to compel the 49th - 95th Respondents to execute their Constitutional and statutory duties of reviewing and making recommendations on the Auditor General's reports on financial statements.

5. The grant of leave to operate as a stay of the 1st Respondent to Summon the Chief Executive Officers of the 47 County Executive to appear before it as from 4th May 2021 to 22nd September 2021;

6. The costs of this application.

2. The grounds for the application are stated in the *ex parte* Applicants' statutory statement dated 5th May 2021, and an affidavit sworn on the same date by the 1st *ex parte* Applicant. I however note that the relief sought in the chamber summons application differs from the relief sought in the statutory statement. I am in this regard bound by the orders sought in the application.

3. In summary, the *ex parte* Applicants averred that the Senate of the Republic of Kenya through the Clerk has by a notice published in the Standard Newspaper of 23rd April 2021 issued a Notice to Appear before the County Public Accounts and Investment Committee of the Senate in the months of May, June, July, August and September directed to the Chief Executive Officers of the 47 County Executive to appear before the said Committee, but does not have the requisite Constitutional authority as envisaged in Article 2(2) and 226(2) of the Constitution. Further, that the Chief Executive Officers of the County Executive who are also the accounting officers and by virtue of Article 226(2) are accountable to the County Assemblies, which have abdicated their roles as mandated by the Constitution

4. The *ex parte* Applicants annexed copies of the notice published in the Standard Newspaper of 23rd April 2021 by the 1st Respondent, and of reports by the 1st Respondent's County Public Accounts and Investments Committee.

The Determination

5. I have considered the application dated 5th May 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 that the impugned actions by the 1st Respondent have commenced.

6. 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.

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 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.

8. In the present application, the *ex parte* Applicants have provided evidence of the summons issued by the 1st Respondent, and have averred as to the grounds and reasons why it considers the 1st Respondent's decision to be illegal. 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 Respondents.

9. 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.”

10. 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.

11. 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.

12. 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**.

13. In the present application, while the summons are amenable to stay as their implementation is on-going, it is not evident what prejudice will be suffered by the *ex parte* Applicants to justify a stay, and given that the unconstitutionality of the 1st Respondent’s actions is yet to be established. The stay orders are therefore not merited for these reasons.

The Disposition

14. In light of the foregoing observations and findings, the *ex parte* Applicants’ Chamber Summons dated 5th May 2021 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants’ Chamber Summons application dated 5th May 2021 is hereby certified as urgent, and is hereby admitted for hearing *ex parte* in the first instance.

II. The *ex parte* Applicants are granted leave to apply for an order of Prohibition to prohibit the 1st Respondent from summoning the Chief Executive Officers of the 47 County Government Executive to appear before it as from 3rd May 2021.

III. The *ex parte* Applicants are granted leave to apply for an order of Mandamus to compel the 49th - 95th Respondents to execute their Constitutional and statutory duties of reviewing and making recommendations on the Auditor General's reports on financial statements.

IV. The prayer that the grant of leave to operate as a stay of the 1st Respondent to Summon the Chief Executive Officers of the 47 County Executive to appear before it as from 4th May 2021 to 22nd September 2021 is declined.

V. The costs of the *ex parte* Applicants’ Chamber Summons application dated 5th May 2021 shall be in the cause.

VI. The *ex parte* Applicants shall file and serve the Respondents and Interested Parties with (i) the substantive Notice of Motion and submissions thereon, (ii) the Chamber Summons dated 5th May 2021 and its supporting documents, (iii) a copy of this ruling, and (v) a hearing notice, within fourteen (14) days from today’s date.

VII. Upon being served with the said pleadings and documents, the Respondents and Interested Parties shall be required to file their responses, which shall include their substantive responses and any preliminary objections to the substantive Notice of Motion, together with their reply submissions, within fourteen (14) days from the date of service.

VIII. The *ex parte* Applicants are granted leave to file and serve a further affidavit and supplementary submissions if need be, which shall be strictly limited to any new facts and issues of law raised by the Respondents and Interested Parties, within seven (7) days of service by the Respondents and Interested Parties.

IX. Timelines shall be strictly observed in light of the on-going impugned actions by the 1st Respondent, and any default by any of the parties shall attract the appropriate sanctions and orders by the Court.

X. A virtual hearing of the *ex parte* Applicant’s substantive Notice of Motion shall be held on 16th 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 16th 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* Applicant by electronic mail by close of business on Monday, 10th May 2021.

XVII. Parties shall be at liberty to apply.

15. Orders accordingly.

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

P. NYAMWEYA

JUDGE