



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. E052 OF 2020**

**KENYA PHARMACEUTICAL ASSOCIATION.....1<sup>ST</sup> APPLICANT**

**PATRICK ODUOR ADERA.....2<sup>ND</sup> APPLICANT**

**PETER ATANDI MOGERE.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**CHITECHI AMBOKA.....1<sup>ST</sup> RESPONDENT**

**WILLIAMSON CHUMBA.....2<sup>ND</sup> RESPONDENT**

**JOEL CHEGE.....3<sup>RD</sup> RESPONDENT**

**FREDRICK KIIO.....4<sup>TH</sup> RESPONDENT**

**AND**

**ASMAN CHITECHI.....1<sup>st</sup> INTERESTED PARTY**

**PHANISE ASUKA.....2<sup>nd</sup> INTERESTED PARTY**

**GREGORY LINTARI.....3<sup>rd</sup> INTERESTED PARTY**

**STEVEN OYAYA.....4<sup>th</sup> INTERESTED PARTY**

**CHANDOH MOSES.....5<sup>th</sup> INTERESTED PARTY**

**ERIC GICHANE.....6<sup>th</sup> INTERESTED PARTY**

**ISSAR NUR.....7<sup>th</sup> INTERESTED PARTY**

**JOHN NJENGA.....8<sup>th</sup> INTERESTED PARTY**

**RULING NO 4**

**The First Application**

1. Two applications are the subject of this ruling. The first is a Notice of Motion dated 31<sup>st</sup> October, 2020, by some officials of the Kenya Pharmaceutical Association, the 1<sup>st</sup> *ex parte* Applicant herein, which officials are also sued herein as Respondents and Interested Parties. The said Respondents and Interested Parties seek the following orders:

- 1) **THAT** the Honourable Court be pleased to bar and/or disqualify the firm of Wangai Wanjuhi Advocates from the conduct of this case on behalf of Kenya Pharmaceutical Association and the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants herein.

- 2) **THAT the Honourable Court be pleased to allow the firm of Abidha & Company to act for the Kenya Pharmaceutical Association based on the Notice of Appointment of Advocates dated 25.08.2020 and filed on 26.08.2020.**
- 3) **THAT the Honourable Court be pleased to order that the name of Kenya Pharmaceutical Association be struck out as one of the Applicants and the same be joined in the matter as an Interested Party.**
- 4) **THAT the Honourable Court be pleased to terminate the instant proceedings since the substantive motion was not filed as per the orders of 17.08.2020 or within the mandatory 21 days.**
- 5) **THAT the costs of this application and this matter be borne by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.**

2. The application is supported by the joint affidavits sworn on even date by Benjamin Mbugua, Jorma Ojwang', Mary Njeri, Eric Seda and Patrick Waweru, who state that they are the representatives of the National Executive Committee and Central Council of the Pharmaceutical Association of Kenya, and the Respondents and Interested Parties herein They allege that 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants and the firm of Wangai Wanjuhi Advocates are aware based on previous cases involving the said Association, that the Central Council must authorize commencement of any proceedings on behalf and in the name of the Association. However, that on 6<sup>th</sup> August, 2020, the 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants masquerading as the Association surreptitiously made an application before this court in an attempt to take over the control of the Association. Further, that the relevant organs of the Association did not instruct the firm of Wangai Wanjuhi Advocates to commence proceedings in this case on its behalf.

3. It was also averred that the Central Council had previously corresponded with the firm of Wangai Wanjuhi Advocates to guide the Association, but that the said firm chose to be the key consultant of the 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants while ignoring the interests of the Association. That they have instructed their advocates to seek leave to cross-examine the 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants together with Mr. Wangai Wanjuhi Advocates on various aspects of the foregoing issues and the grounds in the impugned application because they believe the said firm will be adversely mentioned in these proceedings hence conflicted and as such, it serves the interests of justice and its professional honour that they are barred from participating in these proceedings.

4. Furthermore, it was further averred that the Association, its relevant organs or members did not authorise the said firm to act on its behalf and that it acted devoid of requisite authority thus the Association owes him no obligation. It was contended that the National Executive Committee, Central Council and the branches have authorized the law firm of Abidha & Company Advocates to represent the Kenya Pharmaceutical Association, the Central Council and the Respondents herein and indeed the said firm filed a Notice of Appointment immediately the orders of 17<sup>th</sup> August, 2020 were served.

5. It was also their contention that this Court granted leave for filing of the substantive motion on 17<sup>th</sup> August, 2020 but the same was not complied with. Consequently, the 2<sup>nd</sup> and 3<sup>rd</sup> *Ex-parte* Applicants on 18<sup>th</sup> September, 2020 made an application for the termination of these proceedings albeit there was an error on the face of the record when the Court found that substantive motion had been filed. Be that as it may, it was averred that advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> *Ex-parte* Applicants have admitted that they failed to file the substantive notice of motion within the time allowed by court. They therefore urged court to grant the orders sought in their application.

6. The 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants did not file any response to the Notice of Motion dated 31<sup>st</sup> October, 2020.

### **The Second Application**

7. The second application before the Court is a Notice of Motion dated 2<sup>nd</sup> November 2020 filed by the 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants, who claim to be the duly elected National Chairperson and Secretary General respectively, and members of the National Executive Committee of the Pharmaceutical Association of Kenya. The 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicant are seeking the following orders:

1. **THAT the Honourable Court be pleased to extend the 14 days' period that was granted for purposed of filing the substantive notice of motion.**
2. **THAT this Honourable Court do grant leave to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> *Ex-parte* Applicants to file their Notice of Motion dated 2<sup>nd</sup> November, 2020.**
3. **THAT this Honourable Court admit the Notice of Motion filed on 2<sup>nd</sup> November, 2020 as having been duly filed.**

8. The application is supported by the affidavit of Joseph Wangai Wanjuhi of even date. The 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants contended that on 17<sup>th</sup> August, 2020, this Court granted leave to their counsel to institute judicial review proceedings as sought in a Chamber Summons application dated 6<sup>th</sup> August, 2020. That the said orders were served upon the Respondents and the Interested Parties, who then filed an application seeking to set aside the stay orders on the grounds that the *ex parte* Applicants had misrepresented facts and failed to disclose material facts to the court. That in the midst of waiting for the orders and directions of the court, counsel for *ex parte* Applicants proceeded to erroneously file the incorrect substantive motion dated 1<sup>st</sup> September, 2020.

9. It was their contention that the mistakes of counsel should never be visited upon an innocent client. Furthermore, that this court has discretion to extend time within which to file a substantive motion if it establishes that the delay was not inordinate, is excusable and has not occasioned prejudice to the Respondents as provided under Order 50 Rule of the Civil Procedure Rules. It was further contended that Article 159(2)(d) of the Constitution calls upon courts not to pay undue regard to procedural technicalities but to pay due regard to delivering substantive justice in matters before them. They therefore urged that their application be allowed.

10. In response to that application, the Respondents and the Interested Parties filed Grounds of Opposition dated 13<sup>th</sup> November, 2020. They contended that the court lacks jurisdiction to extend time for filing the substantive motion under the Limitation of Actions Act which provision is couched in mandatory terms. It was further their contention that the ex parte Applicants filed a motion dated 18<sup>th</sup> August, 2020 which did not comply with the requirements of Limitation of Actions Act and the same was struck out as such, no extension can be sought without variation of the orders of 2<sup>nd</sup> September, 2020.

11. Indeed, they were of the view that the impugned application is tantamount to fresh application for leave and there are strict statutory timelines for application of prerogative orders. It was further argued that the procedure of Judicial Review is neither guided by the provisions of the Civil Procedure Rules cited or Article 159 of the Constitution and that mandatory statutory requirement is not a procedural technicality and they cited the case of **Republic v Kahindi Nyafula & 3 Others Ex-parte Kilifi South East Farmers Co-operative (2014) eKLR** for that proposition. They therefore urged that the application be dismissed with costs to the Respondents and the Interested Parties.

### **The Determination**

12. The firm of Abidha & Company Advocates who are on record for the 1<sup>st</sup> ex parte Applicant, Respondents and Interested Parties filed written submissions dated 14<sup>th</sup> December, 2020 in support of their application. The firm of Wangai Wanjuhi Advocates, who are on record for all the ex parte Applicants filed written submissions dated 5<sup>th</sup> November, 2020. As the representation of the 1<sup>st</sup> ex parte Applicant is evidently in contention, the Court will refer to the two firms of advocates as the counsel for the Respondents and Interested Parties, and counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> ex parte Applicants respectively. The two issues that therefore arise for determination is that of the representation of the 1<sup>st</sup> ex parte Applicant, and that of extension of time to file a substantive Notice of Motion

### ***On the Representation of the 1<sup>st</sup> ex parte Applicant***

13. The counsel for the Respondents and Interested Parties submitted that the firm of Wangai Wanjuhi Advocates had no instructions to file the case on behalf of the Kenya Pharmaceutical Association, its National Executive Committee, Central Council and the Branches. In addition, the National Executive Committee, Central Council and the Branches have made outright resolutions that the said firm was never authorized to file a case on behalf of the Association and that their purported actions ought to stop. That the disqualification is further based on the ground that the 1<sup>st</sup> ex parte Applicant, Respondents and Interested Parties intend to request for leave to call Mr. Wangau Wanjuhi Advocate for cross examination regarding various issues in this case should the matter proceed.

14. It was further submitted that the firm of Abidha & Company filed a Notice of Appointment dated 25<sup>th</sup> August, 2020 based on the resolution of the National Executive Committee, Central Council and all the Branches of the Association, and there has been no challenge on that resolution. Counsel therefore urged the court to find that the firm of Abidha & Company Advocates has authority to represent the 1<sup>st</sup> ex parte Applicant, Respondents and Interested Parties herein and further sought to have the name of the 1<sup>st</sup> Ex-parte Applicant struck out and made an Interested Party.

15. Regarding representation of the 1<sup>st</sup> ex parte Applicant, counsel submitted that on 22<sup>nd</sup> May, 2020, Kenya Pharmaceutical Association through its duly elected members, passed resolutions appointing the firm of Wangai Wanjuhi Advocates to represent the suit. To buttress his argument, counsel cited the case of **Directline Assurance Company Limited v Tomson Ondimu (2019) eKLR** where it was noted that in instances of a company, the institution of a suit can only be instigated by way of a resolution because a company is a legal entity whose operations are driven by the relevant authorized officers.

16. I have considered the arguments made by the parties, and will commence my determination by restating the law on appointment of advocates in civil matters as provided for in Order 9 of the Civil Procedure Rules. Order 9. Rule 1 of the said Rules provides that any application to, or appearance, or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf.

17. Order 9 Rule 5 provides for change of advocate , and a party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal. It is notable in this regard, and as held in **Uhuru Highway Development Ltd & Others vs Central Bank of Kenya Ltd & Others (2) [2002] 2 EA 654**, that it is not the business of the Courts to tell litigants which advocate should or should not act in a particular matter as each party to a litigation has the right to choose his or her own advocate, unless it is shown to a Court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter.

18. In addition, the reasons why it is prudent to resolve any conflict as regards representation of a party and to have one firm of advocates on record for a party in a suit were stated **Kenya Commercial Bank Ltd. v. John Benjamin Wanyama**, Civil Appeal No. 97 of 1999; [2007] eKLR as follows:

***“There is no provision in the Rules for two firms of Advocates to be on record contemporaneously or concurrently. And this is for good reason. It would be chaotic if there was on record more than one firm. From which firm would pleadings be expected; who would be served; who would take responsibility, or be held responsible for actions or omissions of the party represented by such firms? ...The rationale for requiring an Advocate, or one firm of Advocates to act for a party and sign pleadings and receive service on behalf of such party is designed to ensure that such Advocate or firm, does take responsibility for the matter and is accountable to Court and the client he or it represents. The law does not bar a party utilizing the services of more than one Advocate or more than one firm of Advocates in a matter but where this is done, it is the Advocate or firm of Advocates on record who engage a senior counsel to lead. The rules of practice recognize that in complex matters a senior counsel may be hired to***

***lead, and it is for this reason that costs are sometimes enhanced, and a certificate for two counsel given by Court.”***

19. In the instant case, different firms of advocates are contesting representation of the 1<sup>st</sup> *ex parte* Applicant. The counsel for the Respondents and Interested Parties has in this respect provided resolutions by executive committee members of various branches of the 1<sup>st</sup> *ex parte* Applicant as regards their appointment to represent the 1<sup>st</sup> *ex parte* Applicant. The counsel for the Respondents and Interested Parties.

20. The legal status of the 1<sup>st</sup> *ex parte* Applicant is however not evident, and no evidence was provided as regards its registration or incorporation as a legal entity. Therefore, the capacity of the 1<sup>st</sup> *ex parte* Applicant to in the first place sue and be sued is also not manifest, as is the law that applies to it in terms of decision making. This Court is not in a position in the circumstances to confirm the 1<sup>st</sup> *ex parte* Applicant as a substantive party in these proceedings, or to validate or invalidate the resolutions relied upon by the counsel for the Respondents and Interested Parties as regards the legal representation of the 1<sup>st</sup> *ex parte* Applicant.

#### ***On Extension of Time***

21. Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants, while citing Article 159 (2) (d) of the Constitution submitted that by echoing those principles, he does not intend to in any manner disregard and/or undermine the importance that procedural rules which create timelines and rules encourage a just and fair trial. However, counsel argued that the Respondents and Interested Parties would not be prejudice should the Amended Notice of Motion application dated 2<sup>nd</sup> November, 2020 is allowed. In addition, counsel submitted that Order 50 Rule 5 of the Civil Procedure Rules grant this court authority and discretion to extend any time issued for purposes of filing upon such terms (if any) as the justice of the cause may require.

22. Consequently, in counsel’s view, for the court to then proceed to issue orders that would result in the striking out of pleadings and/or dismissal of the suit would be draconian and unjust against the plight presented by the Ex-parte Applicants. To that end, counsel cited Musinga J (as he then was) in **Geminia Insurance Co. Limited vs Kennedy Otieno Onyango (2005) eKLR** where he held that it is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that that suit is beyond redemption. Furthermore, counsel argued that the matter before court involves a quasi-public institution whose activities and operations directly affect and touch on public health and as such any hiccups in its operations affect the public thus bring into play public health and public interest and urged court to consider as overriding, any procedural or technical issue arising so that the matter can be heard and determined on its own merit.

23. Counsel for the Respondents and Interested Parties submitted that the statutory timelines for filing a substantive motion is twenty-one (21) days, which timeline was not complied with. In counsel’s view, the 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants cannot therefore come before this court seeking enlargement of time. Counsel further submitted that Section 9(2) of the Limitation of Actions Act and Order 53 Rule 3(1) of the Civil Procedure Rules, 2010 are coached in mandatory terms which do not allow for enlargement of time to file a substantive motion.

24. To buttress his argument, counsel cited the case of **Raila Odinga & Others v Nairobi City Council (1990-1994) 1 E.A. 482** where it was held that the Rules under the Act cannot override the clear provisions of Section 9(2) of the Act; an Act of Parliament cannot be amended by subsidiary legislation; Parliament in its own wisdom has imposed this absolute period of six months and it is Parliament alone which can amend it. A similar position was taken by the court in **Wilson Osolo v John Ojiambo Ochola & the Attorney General CA No. 6 Nairobi of 1995.**

25. Reliance was placed on the case of **Republic v Kahindi Nyafula & 3 Others, Ex-parte Kilifi South East Farmers Co-operative (supra)** where the court held that the Law Reform Act, which is the substantive law dealing with prerogative orders, does not provide for the enlargement of time within which a party should file the motion. Counsel also relied on the case of **Republic v District Land Adjudication Officer Meru South/Mara Sub counties & County Government of Tharaka Nithi Ex-parte Gladys Kainda Mbae & Another (2018) eKLR** where the court was of the view that the requirement that the substantive Notice of Motion be filed within 21 days after leave is granted is not a procedural technicality but a legal imperative.

26. Also cited were the cases of **Republic v Council of Legal Education & Another Exparte Sabiha Kassamia & Another (2018) eKLR** and **Republic v Public Procurement Administrative Board & Another; Mer Security & Communications System Ltd/Megason Electronic & Control 1978 (JV) & Another (Interested Parties); Ex-parte Magal Security Systems Ltd/Firefox Kenya Limited (JV) (2019) eKLR** which were of a similar proposition. It was therefore submitted that the proceedings herein be declared null and void, the 2<sup>nd</sup> and 3<sup>rd</sup> Ex-parte Applicants having failed to comply with the leave orders issued on 18<sup>th</sup> August, 2020.

27. Regarding the Notice of Motion application dated 2<sup>nd</sup> November, 2020 seeking that the fourteen (14) days granted on 17<sup>th</sup> August, 2020 be extended and that the amended Notice of motion dated 18<sup>th</sup> August, 2020 be admitted as duly filed within time, counsel reiterated that the court lacks power to extend timelines under Section 9(2) of the Law Reform Act and Order 53(3)(1) of the Civil Procedure Rules which are coached in mandatory terms. Be that as it may, counsel opined that the 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants ought to have sought a review and/or setting aside of the orders of 2<sup>nd</sup> September, 2020 instead of moving the court via another application seeking extension of time.

28. It is notable that there is currently no settled position, as demonstrated by the various authorities cited by the 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants, Respondents and Interested Parties in their submissions, as to whether the period of 21 days stipulated in Order 53 Rule 3 of the Civil Procedure Rules, 2010, can be enlarged by application of Order 50 Rule 6 of the Civil Procedure Rules, which provides for enlargement of time. Some courts have applied a strict interpretation regarding extension of time within which the substantive motion should be filed, and held that the requirements in Order 53 Rule 3 are mandatory.

29. I subscribe to the position articulated in **Republic vs Speaker of Nairobi City County Assembly & another Exparte Evans Kidero [2017] eKLR** and **Republic vs Public Procurement Administrative Review Board Exparte Syner - Chemie Limited, [2016] e KLR**

that the constitutional provisions as regards fair administrative action, access to justice and substantive justice in Articles 47, 48 and 159 override timelines provided in delegated legislation.

30. Additionally, it is a general principal of statutory interpretation that unless the enabling Act so provides, delegated legislation cannot override any Act or any rule of general law (see **Bennion on Statutory Interpretation, Fifth Edition** at section 50). In the present case the same delegated legislation that provides for the timelines for filing substantive Notices of Motion also allows for the extension of that time under Order 50 Rule 6, as acknowledged by the Court of Appeal in the case of **Wilson Osolo vs John Ojiambo Ochola & the Attorney General CA No. 6 Nairobi of 1995** as follows:

**“ It was a mandatory requirement of Order 53 Rule 3 (1) of the Civil Procedure Rules then ( and it is now again so) that the notice of motion must be filed within 21 days of grant of such leave. No such notice of motion having been apparently filed within 21 days on 15<sup>th</sup> February 1985 there was no proper application before the Superior court. This period of 21 days could have been extended by a reasonable period had there been an application under Order 49 of the Civil Procedure Rules.”**

31. This finding notwithstanding, it has already been found that the legal status of the 1<sup>st</sup> *ex parte* Applicant in the present case is not clear. It is also evident from the current and previous applications filed by the 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants and the Respondents and Interested Parties, that there are disputed facts about the proper representation of, and decision making by the 1<sup>st</sup> *ex parte* Applicant. The dispute herein is therefore that is not amenable to resolution by way of judicial review, but by the normal civil process. The extension of time to file a substantive Notice of Motion will therefore be an exercise in futility in the circumstances.

### **The Disposition**

32. In the premises the 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicant's Notice of Motion dated 2<sup>nd</sup> November 2020 fails. The Respondents and Interested Parties Notice of Motion application dated 30<sup>th</sup> October 2020 only succeeds to the extent that this suit herein is hereby struck out. There shall be no order as to costs of the two applications.

33. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 14<sup>TH</sup> DAY OF JUNE 2021**

**P. NYAMWEYA**

**JUDGE**

**DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF JUNE 2021**

**J. NGAAH**

**JUDGE**