



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APPLICATION NO. 86 OF 2020**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE PRINCIPAL SECRETARY, STATE**

**DEPARTMENT OF LIVESTOCK.....1<sup>ST</sup> RESPONDENT**

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

**FISHERIES AND CO-OPERATIVES.....2<sup>ND</sup> RESPONDENT**

**THE KENYA VETERINARY BOARD.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**AND**

**DR. JOSIAH MACHUKI MANDIEKA.....1<sup>ST</sup> INTERESTED PARTY**

**DR. JOHN WILBEFORCE MUCHIBI.....2<sup>ND</sup> INTERESTED PARTY**

**PROF. JAMES MUCUNU MBARIA.....3<sup>RD</sup> INTERESTED PARTY**

**EX PARTE APPLICANTS:**

**1. DR. ELIZABETH OUKO**

**2. MR. JOHN NGIGI NYUMU**

**3. MR. FRANCIS MUTHURI MUTUA**

**RULING NO. 3**

**The Application**

1. This ruling is on the *ex parte* Applicants' Notice of Motion application dated 20<sup>th</sup> January 2021 in which they are seeking the following substantive orders:

**1. There be an order staying the appointments of Josiah Machiki Mandieka, John Wilberforce Muchibi Mbaria and Douglas Gitonga as Council Members to the Veterinary Surgeons and Veterinary Paraprofessionals (Veterinary Medicines Directorate) as published by the 1st Respondent in Gazette Notice No.3243 published on 24th April 2020 or making any other appointments to the positions of Council Members to the said Directorate other than those recommended by the 3rd Respondent to the 2nd Respondent pending the hearing and determination of this application and intended appeal to the Court of Appeal.**

**2. There be a stay of execution of the judgment, decree and consequential action arising out of the judgment dated and delivered on 12th January 2021 pending the hearing and determination of this application and the intended appeal to the Court of Appeal;**

**3. The costs of this application be borne by the 2nd Respondent in any event**

2. The application is supported by the grounds set out in the application together with the Supporting Affidavit of even date sworn by Dr. Elizabeth Ouko, the 1<sup>st</sup> *ex parte* Applicant herein. It was averred therein that Judgment was delivered on 12<sup>th</sup> January, 2021 dismissing the Applicant's Notice of Motion dated 12<sup>th</sup> May, 2020 with the *ex parte* Applicant condemned to meet the costs of the Interested Parties. Aggrieved by the judgment, the Applicant sought to appeal the decision and even lodged the Notice of Appeal and requested for certified proceedings, judgment and decree to enable them prepare the requisite record of appeal. It was averred that the intended appeal raises substantial points of law with far reaching consequences on the exercise of power by the Respondents and enumerated the grounds of appeal thereunder.

3. It was further averred that unless the stay is granted, the members appointed under the impugned Gazette Notice are likely to exercise authority and power, the legality of which is being challenged in the intended appeal rendering the appeal nugatory leading to substantial loss for containing a potential illegality which cannot be undone. Furthermore, in the absence of stay orders sought herein, the *ex parte* Applicants remain at threat of facing execution costs awarded in the judgment issued on 12<sup>th</sup> January, 2021 with no guarantee of recovering from the same in the event of a successful appeal. Indeed, they were of the view that the Interested Parties are beneficiaries of an illegal appointment and if allowed to resume office as appointed by the 2<sup>nd</sup> Respondent, they will be constrained to implement the very Veterinary Medicines Regulations which were offended by 2<sup>nd</sup> Respondent in the first place.

4. The *ex parte* Applicants were further of the view that failure to stay implementation of the impugned Gazette Notice will complicate the regulation of veterinary practice in Kenya as per the requirements of the Veterinary Surgeons and Veterinary Paraprofessionals Act considering that the 3<sup>rd</sup> Respondent as the regulator of the entire veterinary practice deems the impugned appointments to the Veterinary Medicines Directorate to have been unlawful, the 2<sup>nd</sup> Respondent having ignored the officers nominated by the 3<sup>rd</sup> Respondent as provided for in the Veterinary Surgeons and Veterinary Paraprofessionals Act and Veterinary Medicines Regulations. Indeed, the judgment allows the contested appointees to take office and the appointment is of a continuing nature thus amendable to being stayed. They further argued that the application has been brought without undue delay and they will be greatly prejudiced and will suffer hardship and substantial loss if the judgment and decree is not stayed and execution is allowed to proceed. Accordingly, they urged that the application be allowed.

## **The Responses**

### ***The Respondents' Response***

5. The Respondents filed a Replying Affidavit in opposition of the application sworn on 12<sup>th</sup> April, 2021 by Dr. Obadiah Njagi, the Director of Veterinary Services. He averred that the application is not merited because the court held that the Cabinet Secretary exercised his power and mandate within the law and as such, the appointment of Council Members was done in accordance with the law. Further, that pursuant to the said judgment, the new Council assumed office immediately and held its inaugural meeting on 22<sup>nd</sup> January, 2021 and commenced its businesses thereafter holding subsequent meetings on 25<sup>th</sup> January, 9<sup>th</sup> February, 9<sup>th</sup> March and 26<sup>th</sup> March, 2021 whereby important business of the Council was canvassed and decisions made.

6. Mr. Obadiah further averred that the Veterinary Medicines Directorate executes its mandate through the Council and the Veterinary Medical Department has since the inauguration of the Council exercised its mandate and regulated manufacturing, importation, exportation, distribution and use of veterinary medicines and products in the country, as well as pharmacy and licensing and approval of products for use in the market. That the above mandate ensures that there is quality assurance of Veterinary Medicines right from manufacture to use by the farmers thus contributing to food safety and security in the country. It was further his averment that the Veterinary Medical Department has raised revenue on behalf of the Government through the services rendered in execution of its mandate, and has facilitated international trade and contributed greatly to the GDP through issuance of export and import permits.

7. It was also his contention that since the new Council assumed office, a lot of progress has been made including approval of Veterinary Medicines, Directorate budgeting which includes monies received from the Government; finalization of Human Resource Manuals; finalization of the Organization Career Progression and Guidelines; recruitment of staff, and preparation of the procurement plan in accordance with the Public Finance Management Act. That these are critical functions of great public interest which if delayed via stay of judgment will impact negatively on the larger public.

8. In his view, the *ex parte* Applicants are merely advancing personal interests at the expense of public benefits and interest. Indeed, it was argued that the *ex parte* Applicants have not established any substantial loss that they would suffer as it is not given that they would be the ones to be appointed into the office, and in any event, the Council would find itself stuck in a state of limbo without leadership and would be the one to suffer substantial loss. Accordingly, they urged that the court cannot stay what has already been determined and effected and the court is thus "*functus officio*".

### ***The Interested Parties' Response***

9. The Interested Parties on their part filed Grounds of Opposition dated 15<sup>th</sup> April, 2021. They contended that the court having dismissed the substantive judicial review application dated 12<sup>th</sup> May, 2020 on merits, is *functus officio* and lacks jurisdiction to hear and determine and application for stay of execution made under Order 42 of the Civil Procedure Rules. Furthermore, that the grounds relied on by the *ex parte* Applicants in their present application for stay of execution are requirements or conditions provided for under Rule 5(2) of the Court of Appeal Rules, which do not give the High Court any powers or jurisdiction to hear and determine such an application. Indeed, they urged

that the orders issued by the Court on 12<sup>th</sup> January, 2021 are not capable of being stayed as no form of execution was ordered which the Applicants are seeking to be stayed.

### **The Determination**

10. The instant application was canvassed by way of written submissions. Kibungei & Company Advocates, the *ex parte* Applicants counsel, filed written submissions dated 5<sup>th</sup> March, 2021 in support of the application. Counsel submitted that the only issue for determination was whether the application merits the conditions for grant of the orders of stay of execution pending the intended appeal to the Court of Appeal. Counsel submitted that the principles for grant of stay of execution pending appeal are well settled under Order 42 Rule 6(2) of the Civil Procedure Rules, and that Odunga, J. in **Victory Construction vs BM (a minor suing through next friend PMM), (2019) eKLR** added that the court should consider the overriding objectives stipulated in section 1A and 1B of the Civil Procedure Act which included the just determination of proceedings.

11. Counsel further relied on the case of **Chris Munga Bichage vs Richard Nyagaka Tongi & 2 Others, (2013) eKLR** where the Learned Judges of Appeal held that the Applicant must persuade the court that his intended appeal is arguable, and if the application is not allowed, the appeal would be rendered nugatory. Counsel further submitted that the court in exercising its discretion should in balancing the right of the appellants as against the right to enjoy the fruits of judgment, opt for the lower rather than higher risk of injustice as was enunciated in the case of **Suleiman vs Amboseli Resort Limited (2004) eKLR**.

12. Counsel further argued that the application has been brought without delay since the same was brought on 20<sup>th</sup> January, 2021 barely a week after the judgment was delivered and a notice of appeal lodged on 15<sup>th</sup> January, 2021. It was further submitted that the intended appeal is arguable as enumerated on grounds d (i) to (v) on the face of the Notice of Motion dated 20<sup>th</sup> January, 2021 and as such, has met the threshold of being an arguable appeal as it raises substantial legal issues. Be that as it may, it was argued that the execution of the said judgment shall cause substantial loss not only to the Applicants but also to the Veterinary Surgeons and Veterinary Paraprofessionals and the public at large. As such, counsel submitted that they were seeking this court's intervention urgently so as not to render the intended appeal nugatory and academic. Indeed, counsel argued that the prejudice to be suffered by the Intended Appellants if the stay is not granted outweighs that of the Interested Parties and Respondents.

13. The Respondents on their part relied on written submissions filed by Judith Chimau, Principal State Counsel at the Office of the Attorney General. On the issue whether this court has jurisdiction to grant a stay of its own judgment, counsel submitted that this court is *functus officio* and therefore lacks jurisdiction to grant the reliefs sought. Counsel opposed the *ex parte* Applicant's procedure of approaching this court seeking substantive orders where no appeal had been filed against the judgment of this court. To buttress his argument, counsel cited the cases of **Vishiram Rauji Halal & Another vs Thorntorn & Turnpin (1963) Limited, CA No. 15 of 1990** and **Benson Ngugi Muiruri v Kenya National Capital Corporation Limited, HCCC No. 1981 of 1993** for the proposition that where no appeal is filed, the court from which the appeal is preferred has no jurisdiction to entertain application for stay of execution. Counsel also relied on the *locus classicus* case of **Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Ltd, (1989) eKLR** for the proposition that jurisdiction is everything and without it, the court cannot take any further step.

14. Counsel further submitted that it is a general rule that a court ought not to deny a litigant of the fruits of his judgment save in exceptional circumstances, where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision to the higher court. To that end, counsel cited the case of **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2), (2002) KLR 63**. Be that as it may, it was submitted that the *ex parte* Applicants have failed to establish the substantial loss they would suffer and counsel cited the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto, Bungoma HC Misc. Application No. 42 of 2011** where the court held that the applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. Counsel also relied on the case of **John Gachanja Mundia vs Francis Muriira Alias Francis Muthika & Anor, (2016) eKLR** for the proposition that courts should be guided by a greater sense of justice.

15. Indeed, counsel submitted that the application does not meet the threshold set out in Order 42 Rule 6 of the Civil Procedure Rules. To further buttress his argument, counsel cited the case of **Vishiram Rauji Halal & Another vs Thorntorn & Turnpin (1963) Limited (supra)** whereby the Court of Appeal held that whereas its power to grant stay pending appeal is unfettered, the High Court's jurisdiction to do so is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, that the application must be made without unreasonable delay and what the court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the court on equal footing and see where the scales of justice lie. This position was also adopted by Kimaru, J in **Century Oil Trading Company Ltd v Kenya Shell Limited Nairobi, (Milimani) HCMCA No. 1561 of 2007** and Warsame, J (as he then was) in **Samvir Trustee Limited v Guardian Bank Limited Nairobi, (Milimani) HCCC No. 795 of 1997**. In counsel's view therefore, granting the stay of judgment would have a more negative impact with a bigger injustice to the public at large.

16. It was further submitted the court ought to balance interests of justice so as not to render the Respondents destitute and jobless through stay orders, and relied on the cases of **Victory Construction v BM (a minor suing through next friend one PMM), (2019) eKLR** and **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya), (2015) eKLR** for this view. In any event, counsel argued that while the *ex parte* Applicant may have arguable issues, that could only be an argument before the Court of Appeal and not for stay orders of judgment pending the intended appeal.

17. On their part, Burton Isindu & Company Advocates for the Interested Parties filed written submissions dated 15<sup>th</sup> April, 2021. Counsel argued that the instant application is grounded on Order 42 Rule 6 of the Civil Procedure Rules and Rule 5(2) of the Court of Appeal Rules however, the power the court exercises in judicial review proceedings is donated by Sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules. Therefore, Order 53 of the Civil Procedure Rules is promulgated pursuant to the Law Reform Act as opposed to the Civil Procedure Act, and the only recourse given under the Law Reform Act for an unsuccessful litigant in judicial review proceedings is an appeal. Accordingly, the procedure and requirements under Order 42 Rule 6 of the Civil Procedure Rules are reserved for other civil

matters and not judicial review matters. Similarly, the procedure and requirements under Rule 5(2)(b) of the Court of Appeal Rules are for the exclusive jurisdiction of the Court of Appeal.

18. Be that as it may, counsel went on to argue that the judgment and/or orders of 12<sup>th</sup> January, 2021 do not require any execution by any party, since upon dismissal of the *ex parte* Applicant's case, the gazette notice took effect. As such, this court would essentially be making orders in vain. In any event, counsel submitted that the High Court cannot sit on appeal on its own decision and it is the Court of Appeal that can determine the arguability of the appeal before it, and whether it will be rendered nugatory unless the stay is allowed. Counsel also noted that the authorities cited by the *ex parte* Applicants are irrelevant as the same relate to applications made in normal civil cases under Order 42 of the Civil Procedure Rules and Rule 5(2) of the Court of Appeal Rules.

19. I have considered the arguments by the parties, and note that the main issue for determination is whether the *ex parte* Applicants have satisfied the conditions for grant of an order for stay of execution pending appeal. Grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, the relevant part of which states as follows:

**“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

**(2) No order for stay of execution shall be made under subrule (1) unless—**

**(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

20. For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

(a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

(c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

21. The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties. This purpose of stay of execution pending appeal proceedings was explained in RWW v EKW [2019] eKLR, as follows:

***“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.***

***9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”***

22. On the conditions to be fulfilled for grant of stay, it is not in dispute that the instant application was brought without delay, as the judgment was delivered herein on 12<sup>th</sup> January 2021 and the application herein was filed on 20<sup>th</sup> January 2021. On the second condition of demonstration of substantial loss, it was observed in James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, that:

***“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”***

23. Likewise, the Court of Appeal in National Industrial Credit Bank Ltd vs Aquinas Francis Wasike, Nrb CA Civil Application No 238 of 2005 where it was held as follows:

**“The court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge see for example Section 112 of the Evidence Act Cap 80 Laws of Kenya.”**

24. The judgment that was delivered herein dismissed the *ex parte* Applicants’ Notice of Motion dated 12<sup>th</sup> May 2020, in which they were seeking to quash Gazette Notice No. 3243 dated 24<sup>th</sup> April, 2020 which appointed Josiah Machiki Mandieka, John Wilberforce Muchibi, James Muchini Mbaria and Douglas Gitonga as Council Members of the Veterinary Medicine Directorate, and that the 2<sup>nd</sup> Respondent is compelled to gazette and appoint other persons instead as recommended by the 3<sup>rd</sup> Respondent. Therefore, the order was a negative order, as there are no positive acts required to be performed by any party as a result of the Court order.

25. In the case of **Chania Travellers Co-operative Savings and Credits Society Limited v Attorney General & 3 others; Daniel Timothy Muriuki & 3 others (Interested Parties/Respondent) [2021] eKLR**, the court held as follows in this regard;

**“It is not in doubt as pointed out by the Respondents that the Court granted a negative order as the court merely dismissed the Judicial Review Application as sought by the Ex parte Applicant. Courts have on various occasions held that when a Court has granted negative orders, there is nothing that can be stayed. See the case of Western College Farts And Applied Sciences ...Vs... Oranga & Others [1976] KLR 63 where the Court held that:-**

**“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”**

***The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”***

26. Further In the case of **John Mbuu Muthoni & Another vs Ruth Muthoni Kariuki (2017) eKLR**, the Court held that:

**“33. I have anxiously given thought to this question. I have looked at the cases cited by the parties. In addition, I have returned to Justice Odunga’s decision in *R v The Commissioner for Investigations & Enforcement Ex Parte Wananchi Group of Kenya Limited [2014] eKLR*. In that case, Justice Odunga declined to grant a stay pending appeal after dismissing a Judicial Review Application on the ground that where the High Court has dismissed an application for judicial review, the Court does not grant any positive order in favour of the Respondents which is capable of execution. As such a stay of execution is not available in such circumstances. 34. I am persuaded that the circumstances here are the same as those in the Wananchi Group Case which I find to be persuasive. It is in accord with the James Hoseah Gitau Mwaru Case cited above. The narrow holding in that case is that a stay of execution is not available where the Court has declined to issue judicial review orders since a refusal to issue the orders cannot be “executed.” A broader holding would be that whenever a Court strikes out a suit or refuses to grant the substantive orders sought by the Court, a stay of execution is not available since any such stay would not be directed at a decision against which the intended appeal is not directed.”**

27. Given that the order of this Court dismissing the suit was a negative order, there is no order to be executed and the said orders are incapable of being stayed. The *ex parte* Applicants have therefore not demonstrated what damages they would suffer if the order for stay is not granted, and how its appeal may be rendered nugatory in this respect.

28. In addition, it is not evident what security the *ex parte* Applicants can offer in the circumstances, that shall ensure that the Respondents and Interested Parties are not denied the opportunity to enjoy the fruits of their judgment, given that the decree herein is not a money decree. With regard to security for costs, the court in **Absalom Dova vs Tarbo Transporters [2013] eKLR** held as follows:

**“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”**

29. The conditions for stay pending appeal have therefore not been satisfied by the *ex parte* Applicants to warrant the stay of the judgment and decree issued herein pending appeal.

30. In the premises, the *ex parte* Applicants’ Notice of Motion application dated 20<sup>th</sup> January 2021 is hereby dismissed with no order as to costs.

31. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 8<sup>TH</sup> DAY OF OCTOBER 2021**

**P. NYAMWEYA**

**JUDGE**

**DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF OCTOBER 2021**

**J. NGAAH**

**JUDGE**