



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 81 OF 2020

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

AND

IN THE MATTER OF THE LAW REFORM ACT

BETWEEN

SCION HEALTHCARE LIMITED.....APPLICANT

VERSUS

HITAN MAJEVDIA, NAIROBI COUNTY

EXECUTIVE COMMITTEE MEMBER.....RESPONDENT

RULING

The Application

1. Scion Healthcare Limited (hereinafter “the Applicant”) owns and operates a hospital known as Scion Healthcare – Kwa Njenga, along Catherine Ndereva Road, Nairobi (hereinafter “the subject hospital”), and claims that it is duly licenced to operate the said hospital. It further claims that Hitan Majevidia, a Nairobi County Executive Member (hereinafter the Respondent), illegally closed the said hospital by way of a closure notice dated 3rd April 2020. The Applicant has consequently filed the present application by way of a Chamber Summons dated 7th April 2020, seeking orders that the matter be certified urgent, and for leave to apply for the following orders:

- a) **An order of certiorari to bring into this Court the decision of the Respondent closing the Applicant’s hospital contained in his letter dated 3rd April 2020 and quash it;**
- b) **An order of certiorari to bring into this Court the decision of the Respondent to investigate the Applicant based on a non-existent complaint; and**
- c) **An order of prohibition prohibiting the Respondent from interfering with, obstructing, interrupting or closing the Applicant’s hospital operations**

2. The Applicant further sought orders that the leave so granted do operate as a stay of the closure of the subject hospital, pending the hearing and determination of this judicial review cause, as well as an order as to costs. The main grounds for the application are stated in the Applicant’s Statutory Statement dated 7th April 2020, and a verifying affidavit sworn on the same date by Augustine Kinyua, a director of the Applicant.

3. In summary, the Applicant alleges that the Respondent did not give it any hearing prior to the closure of the hospital, did not provide it with the alleged inspection report it relied upon, and has not notified it of the alleged complaint made by its landlord and public health requirements it is supposed to meet. Therefore, that the Respondent’s action is arbitrary, did not follow due process, and is in abuse of power. On the prejudice it has suffered, the Applicant pointed out the interruption of health care services being given to patients presently admitted to the hospital and the risk to their health and lives, the loss of employment of various hospital staff, and the loss of business and income.

4. The Applicant annexed copies of the licence to operate issued to the subject hospital by the Medical Practitioners and Dentists Board, the

Respondent's closure notice dated 3rd April 2020, and correspondence on the complaint made as against the hospital as evidence.

The Determination

5. Upon carefully considering the application dated 8th April 2020 and the reasons offered in support of the urgency, I am satisfied that the Applicant has demonstrated that the matter is urgent, and that the same ought to be heard on a priority basis. This is for the reasons that it is evident that the operations of the Applicant's hospital have been brought to a standstill, and there may be prejudice caused to the Applicant by the said closure.

6. On the orders sought for leave to commence judicial review proceedings, the applicable law on leave 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 reason for the leave was 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** as follows:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”.

7. It is 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 court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. The merits test commonly applied is whether the ground of challenge is arguable. In **Sharma vs Brown Antoine (2007) 1 WLR 780**, Lord Bingham explained 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, however, that the test is flexible depending on the nature and gravity of the issues.

8. In the present application, the Applicant's grievance emanates from a letter written by the Respondent dated 3rd April 2020. The material part of the letter reads as follows:

“ The Proprietor

Scion Nursing Home

Imara Daima

NAIROBI

RE: CLOSURE OF SCION NURSING HOME PLOT 1/22 CATHERINE NDEREVA ROAD

The above subject matter refers.

Having carefully read the complaint by the landlord of Plot No. 1/22, Catherine Ndereva Road and subsequent Public Health Inspection report, and based on the report, the facility should be and is hereby closed forthwith until the raised Public Health requirements are met.

Please ensure compliance with the given recommendations.

HITAN MAJEVDIA, OGW

COUNTY EXECUTIVE COMMITTEE MEMBER”

9. It is apparent from the evidence adduced, and as confirmed by the Applicant's averments, that the hospital referred to in the impugned letter which has been closed is its licenced hospital. The Applicant also averred to the reasons why it considers this action to be illegal, and the prejudice it will face. To this extent I find that the Applicant has shown an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondent.

10. On the question of whether the said leave can operate as a stay of the decision to close the subject hospital, the applicable principle is that such a decision is made in exercise of judicial discretion, which must be exercised judiciously. Order 53 Rule 1(4) of the Civil Procedure Rules further 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. In **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, 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. 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.

12. The main factor is whether or not the decision or action sought to be stayed has been fully implemented. It was thus held in **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. Similarly, Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** expressed himself on this factor as follows:

“As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction... In judicial review applications the Court should always ensure that the *ex parte* applicant’s application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act... A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.”

13. This factor was also discussed in **R (H). vs Ashworth Special Hospital Authority (supra)** where Dyson L.J. held as follows:

“As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.

I now turn to the third situation, which occurs where the decision has not only been made, but it has been carried out in full. At first sight, it seems nonsensical to speak of making an order that such a decision should be suspended. How can one say of a decision that has been fully implemented that it should cease to have effect? Once the decision has been implemented, it is a past event, and it is impossible to suspend a piece of history. At first sight, this argument seems irresistible, but I think it is wrong. It overlooks the fact that a successful judicial review challenge does in a very real sense rewrite history...It is, therefore, difficult to see why the court should not in principle have jurisdiction to say that the order shall temporarily cease to have effect, with the same result for the time being as will be the permanent outcome if it is ultimately held to be unlawful and is quashed. I would hold that the court has jurisdiction to stay the decision of a tribunal which is subject to a judicial review challenge, even where the decision has been fully implemented But the jurisdiction should be exercised sparingly, and where it is exercised, the court should decide the judicial review application, if at all possible, within days of the order of stay”

14. A similar position has been taken by Odunga J. in **Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR** and in **James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR**, where the learned judge held that it is only where the decision in question is complete that the Court cannot stay the same. However, where what ought to be stayed is a continuing process, the same may be stayed at any stage of the proceedings.

15. From the above decisions, it follows that where 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.

16. In the present application the decision made by the Respondent in the letter dated 3rd April 2020 as shown in the foregoing was to have effect immediately, and the Applicant’s hospital was to be closed forthwith. It is therefore a decision which has been implemented. In addition, the Respondent in the impugned letter dated 3rd April 2020 alluded to a complaint made by the Applicant’s landlord, and a public health inspection report on the subject hospital, the existence of which this Court needs to first establish and if in existence be privy to, before it can make any orders as to the continued operations of the said hospital. This can only be possible after the Respondent has been given an opportunity to be heard.

17. Therefore, it is the finding of this Court that even though it has jurisdiction and the discretion to suspend the Respondent’s decision, a number of factors militate against the exercise of that discretion. Firstly, as noted above, this discretion should be exercised sparingly where a decision has been implemented. Secondly, there may be a public interest element involved in the present application, as the letter of closure produced as evidence by the Applicant indicates that there are public health considerations that informed the Respondent’s decision.

18. In this respect I agree with the explanation given by Majanja J. in **R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another (2012) eKLR**, as well as in **R (H). vs Ashworth Special Hospital Authority (supra)** that since judicial review proceedings are

public law proceedings for vindication of private rights, the public interest is a relevant consideration in the granting of stay orders, and that the Court should strike a balance between the rights of an individual and the public interest.

19. It is thus my view that there is need to preserve the current *status quo* until the reasons and legality of the Respondent's actions are established, because of the public health considerations that may involved. The stay orders sought by the Applicant cannot therefore be granted at this stage. In addition, a more convenient balance will be achieved between the Applicant's interests and the public interest if the present judicial review proceedings are disposed of with finality in the shortest of time possible.

The Orders

20. In light of the foregoing observations and findings, the Applicant's Chamber Summons dated 7th April 2020 is allowed only to the extent of the following orders:

i. The Chamber Summons application dated 7th April 2020 be and is hereby certified as urgent, and that the same is hereby admitted for hearing on a priority basis.

ii. The Applicant is granted leave to seek by way of judicial review proceedings, an order of Certiorari to bring into this Court for purposes of being quashed, the decision of the Respondent to close the Applicant's hospital contained in his letter dated 3rd April 2020.

iii. The Applicant is granted leave to seek by way of judicial review proceedings, an order of Certiorari to bring into this Court for purposes of being quashed, the decision of the Respondent to investigate the Applicant.

iv. The Applicant is granted leave to seek by way of judicial review proceedings, an order of Prohibition prohibiting the Respondent from interfering with, obstructing, interrupting or closing the Applicant's hospital operations.

v. The prayer that the leave so granted do operate as a stay of the closure of the Applicant's hospital known as Scion Healthcare – Kwa Njenga, pending the hearing and determination of this judicial review cause is declined.

vi. The costs of the Chamber Summons dated 7th April 2020 shall be in the cause.

vii. The Applicant shall file and serve the Respondent with the substantive Notice of Motion, and shall also serve the Respondent with the Chamber Summons dated 7th April 2020 and its supporting documents together with a copy of this ruling, within seven (7) days from today's date.

viii. Upon being served with the said pleadings and documents, the Respondent shall be required to file their reply to the substantive Notice of Motion within seven (7) days from the date of service.

ix. Upon receipt of the Respondent's reply, the Applicant is granted leave to file and serve any further pleadings if need be, together with skeletal submissions on its substantive Notice of Motion application, within seven (7) days service.

x. The Respondent shall also be required to file and serve any further pleadings if need be, together with its submissions on the substantive Notice of Motion within seven (7) days of service of the Applicant's submissions.

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 Applicant's substantive Notice of Motion on the basis of the electronic copies of the pleadings and submissions filed.

xii. The Deputy Registrar of this Court shall send a copy of this ruling and the extracted orders to the Applicant by electronic mail by close of business today.

xiii. 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 send a copy of documents so served to the Deputy Registrar of this Court at milimani.judicialreview@court.go.ke with copies to ceciliakithinji@yahoo.co.uk and asunachristine51@gmail.com.

ix. The Deputy Registrar of this Court shall bring the file to the attention of the duty Judge for further directions on 19th May 2020.

x. Parties shall be at liberty to apply.

21. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF APRIL 2020

P. NYAMWEYA

JUDGE