



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APPLICATION NO. 95 OF 2020**

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

**BETWEEN**

REPUBLIC.....APPLICANT

**VERSUS**

THE NATIONAL ASSEMBLY .....1<sup>ST</sup> RESPONDENT

THE CABINET SECRETARY, NATIONAL

TREASURY AND PLANNING .....2<sup>ND</sup> RESPONDENT

THE HON. ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT

**AND**

THE RETIREMENT BENEFITS AUTHORITY.....INTERESTED PARTY

**EX PARTE APPLICANT: OKIYA OMTATAH OKOITI**

**RULING**

**The Application**

1. Okiya Omtatah Okoiti, the *ex parte* Applicant herein is aggrieved by a amendments made to section 38 of the Retirement Benefits Act (1997) by the Tax Laws (Amendment) Act, 2020, to allow for the use of retirement benefits to purchase a residential house.
2. The *ex parte* Applicant has consequently moved this Court in an application by way of Chamber Summons dated 8<sup>th</sup> May 2020, seeking the following orders:

**“1. THAT the Court be pleased to certify the application as extremely urgent and hear it *ex-parte* at the earliest opportunity.**

**2. THAT leave be granted to the *Ex Parte* Applicant to seek by way of Judicial Review, that an order of certiorari do issue, to bring to this Court for purposes of being quashed, and to be quashed:**

**(a) The amendments made by the Tax Laws (Amendment) Act, 2020 to Section 38(1A) of The Retirement Benefits Act, No.3 of 1997.**

**(b) The Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020.**

**3. THAT leave be granted to the *ex-parte* applicant to seek by way of Judicial Review, that an order of prohibition do issue, prohibiting the respondents herein, and any other person howsoever acting, from implementing, giving effect to, or enforcing:**

(a) **The amendments made by the Tax Laws (Amendment) Act, 2020 to Section 38(1A) of The Retirement Benefits Act, No.3 of 1997.**

(b) **The Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020.**

4. **THAT pending the filing, hearing, and the final determination of the substantive Judicial Review Notice of Motion herein, or until further Court Orders, leave so granted do operate as a stay or suspension of:**

(a) **The amendments made by the Tax Laws (Amendment) Act, 2020 to Section 38(1A) of The Retirement Benefits Act, No.3 of 1997.**

(b) **The Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020.**

5. **THAT consequent to the grant of the prayers above the Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.**

6. **THAT costs be in the cause”.**

3. The application is supported by the *ex parte* Applicants’ Statutory Statement dated 8<sup>th</sup> May 2020, and a verifying affidavit he swore on the same date which detailed out the grounds set out in the foregoing. In summary, the *ex parte* Applicant avers that the substantive amendments to section 38 of the Retirements Benefits Act were not in the Amendment Act, which was published on 30<sup>th</sup> March 2020 as the Tax Laws (Amendment) Bill, 2020, and passed by the National Assembly on 20<sup>th</sup> April 2020. Further, that on 25<sup>th</sup> April, 2020, H. E. President Uhuru Muigai Kenyatta assented to the Tax Laws (Amendment) Bill, 2020 thus enacting the Tax Laws (Amendment) Act, 2020.

4. It is the *ex parte* Applicant’s contention that the said amendment did not therefore go through the due process in law for enacting legislation including public participation. In addition, that the impugned amendment are in the process of being operationalized through the **Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020**, Which are undergoing public participation before they are gazetted.

5. The *ex parte* Applicant annexed copies of the following documents in support of his application:

(a) The Tax Laws (Amendment) Bill, 2020.

(b) The National Assembly’s Departmental Committee on Finance and National Planning’s **Report on the Consideration of the Tax Laws (Amendment) Bill, 2020.**

(c) Presidential Press Statement on the signing into law of the The Tax Laws (Amendment) Bill, 2020.

(d) The Tax Laws (Amendment) Act, 2020.

(e) The Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020.

(f) The Retirement Benefits Authority’s invitation to Public Participation to the Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020.

(g) Retirement Benefits Act No. 3 of 1997.

(h) The National Assembly Standing Orders-4<sup>th</sup> Edition.

### **The Determination**

6. I have considered the application dated 12<sup>th</sup> May 2020 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicant has demonstrated that this matter is urgent in light of the intended enactment of the regulations to give effect to section 38 of the Retirement Benefits Act.

7. On the orders sought by the *ex parte* Applicant 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 court and make the decision as to whether an applicant’s case is sufficiently meritorious to justify leave. In the present application, the *ex parte* Applicant has provided evidence of the Bill leading to the impugned amendment, the Amending Act and of the intended regulation to operationalize the amendment. The *ex parte* Applicant has also averred to the grounds and reasons why it considers the Respondents’ actions to be illegal.

9. 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 Respondent.

10. On the question of whether the said leave can operate as a stay of the impugned report, 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. 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. 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. See in this regard 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 the implementation stage and processes of the of the impugned amendment and proposed regulations need to be clarified to the Court. In addition, given that the amendment will affect members of the public who are not parties in this suit, it is necessary to hear what prejudice the public is likely to suffer if the stay orders sought are not granted. The question and prayer that the leave granted herein operates as a stay of the impugned amendment and proposed regulations will therefore need to be argued *inter-partes*.

#### **The Orders**

14. In light of the foregoing observations and findings, the *ex parte* Applicants’ Chamber Summons dated 8<sup>th</sup> May 2020 is found to be merited to the extent of the following orders:

**I. The *ex parte* Applicants’ Chamber Summons application dated 8<sup>th</sup> May 2020 be and is hereby certified as urgent, and that the same is hereby admitted for hearing *ex parte* at the first instance.**

**II. The *ex parte* Applicant is granted leave to seek by way of Judicial Review, that an order of *Certiorari* to to bring to this Court for purposes of being quashed, and to be quashed:**

**(a) The amendments made by the Tax Laws (Amendment) Act, 2020 to Section 38(1A) of The Retirement Benefits Act, No.3 of 1997.**

**(b) The Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020.**

**III. The *ex parte* Applicant is granted leave to seek by way of Judicial Review, that an order of Prohibition, prohibiting the Respondents herein, and any other person howsoever acting, from implementing, giving effect to, or enforcing:**

**(a) The amendments made by the Tax Laws (Amendment) Act, 2020 to Section 38(1A) of The Retirement Benefits Act, No.3 of 1997.**

**(b) The Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020.**

**IV. Prayer 4 of the *ex parte* Applicant’s Chamber Summons dated 8<sup>th</sup> May 2020 seeking orders that “pending the filing, hearing, and the final determination of the substantive Judicial Review Notice of Motion herein, or until further Court Orders, leave so granted do operate as a stay or suspension of:**

**(a) The amendments made by the Tax Laws (Amendment) Act, 2020 to Section 38(1A) of The Retirement Benefits Act, No.3 of 1997.**

**(b) The Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020.”**

**shall be heard *inter partes* , and a ruling thereon shall be reserved at a hearing to be held on 9<sup>th</sup> June 2020 .**

**V. The *ex parte* Applicant shall file and serve the Respondents with (i) the substantive Notice of Motion (ii) the Chamber Summons dated 8<sup>th</sup> May 2020 and its supporting documents, (iii) skeletal submission on the prayer 4 of the said Chamber**

Summons, (iv) a copy of this ruling, and (v) a hearing notice, within ten (10) days from today's date.

VI. Upon being served with the said pleadings and documents, the Respondents shall be required to file their responses to the substantive Notice of Motion and skeletal submissions on prayer 4 of the *ex parte* Applicant's Chamber Summons dated 8<sup>th</sup> May 2020 within fourteen (14) days from the date of service.

VII. 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 prayer 4 of the *ex parte* Applicant's Chamber Summons dated 8<sup>th</sup> May 2020 and 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.

VIII. In this respect, all the parties shall file their pleadings, applications and written submissions electronically, by sending them to the Deputy Registrar of the Judicial Review Division at [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com), and shall also avail the electronic copies in word format.

IX. The electronic copies of pleadings and documents sent by the parties shall be clearly and correctly titled to indicate the J.R Case Number, the name of the Party sending it (that is whether the *Ex Parte* Applicant, Respondent or Interested Party), and the nature of the pleading or document.

X. 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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XI. The parties shall also be required to send the respective affidavits of service by way of electronic mail to the Deputy Registrar of the Judicial Review Division at [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XII. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling and the extracted orders to the *ex parte* Applicant by electronic mail by close of business on Wednesday, 13<sup>th</sup> May 2020.

XIII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 9<sup>th</sup> June 2020, and bring it to the attention of a Judge in the Division on that date for reservation of a ruling on prayer 4 of the *ex parte* Applicant's Chamber Summons dated 8<sup>th</sup> May 2020 and for further directions.

XIV. Parties shall be at liberty to apply.

15. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 13<sup>TH</sup> DAY OF MAY 2020

P. NYAMWEYA

JUDGE