



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APPLICATION NO. 76 OF 2020**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE**

**JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE MEDICAL PRACTITIONERS AND**

**DENTISTS COUNCIL.....1<sup>ST</sup> RESPONDENT**

**THE DISCIPLINARY AND ETHICS COMMITTEE..... 2<sup>ND</sup>RESPONDENT**

**AND**

**ROSALINE MWIHAKI NDUNGU.....INTERESTED PARTY**

**EX PARTE APPLICANT:**

**MARY HELP OF THE SICK MISSION HOSPITAL**

**RULING**

**The Application**

1. The *ex parte* Applicant herein is Mary Help of the Sick Mission Hospital, and it is aggrieved by a ruling sent to it on 18<sup>th</sup> March 2020 by the Medical Practitioners and Dentists Council, through its Disciplinary and Ethics Committee, which are sued as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein. The said ruling was with respect to a complaint lodged with it on 20<sup>th</sup> July 2017 by Rosaline Mwihaki Ndungu, who is joined as an Interested Party herein.

2. The *ex parte* Applicant was reprimanded in the said ruling, and was required *inter alia* to pay a fine of Kshs 300,000/= to the 1<sup>st</sup> Respondent within thirty (30) days. The *ex parte* Applicant consequently filed an application by way of a Chamber Summons dated 30<sup>th</sup> March 2020, seeking the following orders:

**1. The application be certified urgent and be heard *ex parte* in the first instance.**

**2. That this Court be please to grant leave to the *ex parte* Applicant to institute judicial review proceedings in the nature of Certiorari to bring to this Court and quash the proceedings and ruling by the Respondents as delivered in PIC Case No. 31 of 2017.**

**3. That this Court be pleased to grant leave to the *ex parte* Applicant to institute judicial review proceedings in the nature of Mandamus to compel the Respondent and Interested Party to avail to the *ex parte* Applicant:**

**a) A copy of the video recorded by one George Jumba in conducting the laparoscopy procedure that led to the**

removal of a gauze from the Interested Party

b) The gauze that was removed by one George Jumba through the laparoscopy procedure from the Interested Party

c) A copy of the CT Scan carried out on 4<sup>th</sup> July 2017 by Dr. Bernadette Kiigu

d) A copy of the CT Scan carried out on 15<sup>th</sup> February 2018 by Dr. Samuel Ngugi

e) A copy of the medical records of treatment of the Interested Party in relation to the treatment and procedures that she underwent at Nazareth Hospital

f) A copy of the medical records of treatment of the Interested Party in relation to the treatment and procedures that she underwent at Thika Nursing Home Hospital

**4. That this Court be pleased to grant leave to the ex parte Applicant to institute judicial review proceedings in the nature of Mandamus to compel the Respondents to begin the hearing and inquiry against the ex parte Applicant de Novo.**

**5. That this Court be pleased to grant leave to the ex parte Applicant to institute judicial review proceedings in the nature of Mandamus to compel the Respondents to re-constitute its members when the inquiry and hearing against the Applicant commences de novo.**

**6. That this Court be pleased to grant leave to the ex parte Applicant to institute judicial review proceedings in the nature of Prohibition to prohibit the Respondents from conducting an inquiry and hearing against the Applicant if they fail to comply with order 3 above.**

**7. That grant of leave operates as a stay of execution of the Ruling of the Respondents and Orders issued therein as delivered in PIC Case No. 31 of 2017.**

**8. That the ex parte Applicant be at liberty to apply to the Court for all necessary and consequential orders that the Court may deem fit to grant.**

**9. That the costs of the application be provided for.**

3. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 30<sup>th</sup> March 2020, and a verifying affidavit sworn on the same date by Esther Wanjiru, the *ex parte* Applicant's matron. In summary, the Applicant alleges that when the 2<sup>nd</sup> Respondent proceeded with the hearing of the Interested Party's complaint on 25<sup>th</sup> October 2019, it denied the *ex parte* Applicant the opportunity to cross-examine various witnesses, denied it access to medical evidence and medical records of treatment relied upon by the Interested Party, was biased, and wrote its ruling without according the *ex parte* Applicant a fair hearing. Furthermore, that it denied the *ex parte* Applicant the record of the proceedings.

4. The *ex parte* Applicant annexed copies of the complaint lodged by the Interested Party, correspondence with the Respondents and the 2<sup>nd</sup> Respondents ruling sent to it on 18<sup>th</sup> March 2020.

5. On 31<sup>st</sup> March 2020, the application came up for hearing before Hon. Mr. Justice Mativo, and the learned Judge directed the *ex parte* Applicant serves the Respondents and Interested Party with the application, and submissions on the questions of leave and stay within three days. The Respondents and Interested Party were also granted leave to file and serve their submissions within three days of service. Once the pleadings were filed and due to the scaling down of court operations as a result of the COVID-19 pandemic, the Deputy Registrar of this Court was to bring the file to the attention of the Judge for reservation of the ruling.

6. On 9<sup>th</sup> April 2020 the *ex parte* Applicant's advocate on record wrote to the Deputy Registrar by email and indicated that they had served the Respondents and Interested party as directed, and the said parties had failed to file responses. They also attached a copy of their submissions dated 8<sup>th</sup> April 2020, and the judicial authorities relied upon. The counsel sought directions from this Court, and was directed to provide evidence of service. They subsequently sent the affidavits of service they filed sworn on 27<sup>th</sup> April 2020, attesting to service of the pleadings and this Courts orders and submissions on the Respondents and Interested Party.

7. This Court on 29<sup>th</sup> April 2020 directed the Deputy Registrar to inform the parties that ruling would be delivered on 11<sup>th</sup> May 2020, which directions were communicated to the parties electronically. I have perused the Court record and note that the Respondents and Interested Party did not file any responses and submissions after the said directions were given.

### **The Determination**

8. I have considered the submissions filed by the *ex parte* Applicant, and the main issues in this application is whether leave to commence judicial review proceedings should be granted to the ex parte Applicant, and if so, if ought to operate as a stay of the 2<sup>nd</sup> Respondent's decision.

9. On the issue of leave, the *ex parte* Applicant relied on various decisions including **Republic vs. County Council of Kwale & Another**

**Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996, Republic vs Kenya Revenue Authority, Commissioner for Investigation and Enforcement Department ex parte Centrica Investments (2019) e KLR and Mirugi Kariuki vs Attorney General (1992) KLR 8** for the submission that at this stage the Applicant needs to demonstrate that he has an arguable prima facie case for consideration. Section 7(1) and (2) of the Fair Administrative Action Act was also cited for the grounds for judicial review orders. The *ex parte* Applicant in this respect submitted that his application had outlined the breach of natural justice and failure to accord him a fair hearing, as well as the bias and unreasonableness on the part of the Respondents.

10. The applicable law on the grant of leave to commence judicial review proceedings 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 (supra)** 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”.**

11. 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. In the present application, the *ex parte* Applicant has provided evidence of the complaint by the Interested Party and ruling by the 2<sup>nd</sup> Respondent in PIC Case No 31 of 2017, and the correspondence by the *ex parte* Applicant to the Respondents, evidencing its concern on the conduct of the proceedings during the hearing.

12. 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.

13. On the question of whether the said leave can operate as a stay of the ruling by the 2<sup>nd</sup> Respondent, the *ex parte* Applicant cited various decisions including **Munir Sheikh Ahmed vs Capital Markets Authority (2018) e KLR, 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, and R (H) vs Ashworth Special Hospital Authority (2003) 1 WLR 127** on the principles that guide the grant of a stay.

14. Applying these principles, the *ex parte* Applicant submitted that while the decision making by the Respondents is complete, the implementation of the decision is yet to commence. Further, that the decision and orders in the said ruling are only to be implemented after the lapse of thirty days which is the time frame provided for under section 20(6) of the Medical Practitioners and Dentists Act for an appeal from decisions made by the Respondents.

15. The applicable principle as to the grant of leave to operate as a stay is that such an order 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.”**

16. In **R (H) vs Ashworth Special Hospital Authority (supra)**, 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.

17. It has in this regard been held 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. See in this regard the decisions in **Taib A. Taib vs. The Minister for Local Government & Others (supra), Jared Benson Kangwana vs. Attorney General, (supra), 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.**

18. In the present application the *ex parte* Applicant is required to undertake some actions consequential to the ruling by the 2<sup>nd</sup> Respondent, including to establish a weekly schedule of CPD activities for maternity staff on emergency obstetric care for six months; initiate mediation with the complainant with a view to compensation and update the 1<sup>st</sup> Respondent within thirty days; payment of a fine of Kshs 300,000/= to the 1<sup>st</sup> Respondent within thirty days; and to review its consent form. To this extent the implementation of the ruling by the 2<sup>nd</sup> Respondent is of a continuing nature, and is amenable to stay. In addition, there is financial prejudice that is likely to be caused to the *ex parte* Applicant in the event the penalty imposed is enforced, and its application is eventually successful.

19. I however also note that the ruling and orders by the 2<sup>nd</sup> Respondent affected other parties who are not in this suit, and the stay orders cannot therefore be granted in the manner sought by the *ex parte* Applicant. The stay orders that are merited are only those that will maintain the *status quo* with respect to any positive action required on the part of the *ex parte* Applicant, and not with respect to the other orders that are not disputed by affected parties.

### **The Orders**

20. In light of the foregoing observations and findings, the *ex parte* Applicant's Chamber Summons dated 30<sup>th</sup> March 2020 is found to be merited to the extent of the following orders:

**i. The *ex parte* Applicant is granted leave to institute judicial review proceedings in the nature of Certiorari to bring to this Court and quash the proceedings and ruling by the Respondents as delivered in PIC Case No. 31 of 2017.**

**ii. The *ex parte* Applicant is granted leave to institute judicial review proceedings in the nature of Mandamus to compel the Respondent and Interested Party to avail to the *ex parte* Applicant:**

**a) A copy of the video recorded by one George Jumba in conducting the laparoscopy procedure that led to the removal of a gauze from the Interested Party**

**b) The gauze that was removed by one George Jumba through the laparoscopy procedure from the Interested Party**

**c) A copy of the CT Scan carried out on 4<sup>th</sup> July 2017 by Dr. Bernadette Kiigu**

**d) A copy of the CT Scan carried out on 15<sup>th</sup> February 2018 by Dr. Samuel Ngugi**

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**f) A copy of the medical records of treatment of the Interested Party in relation to the treatment and procedures that she underwent at Thika Nursing Home Hospital**

**iii. The *ex parte* Applicant is granted leave to institute judicial review proceedings in the nature of Mandamus to compel the Respondents to begin the hearing and inquiry against the *ex parte* Applicant *de novo*.**

**iv. The *ex parte* Applicant is granted leave to institute judicial review proceedings in the nature of Mandamus to compel the Respondents to re-constitute its members when the inquiry and hearing against the Applicant commences *de novo*.**

**v. The *ex parte* Applicant is granted leave to institute judicial review proceedings in the nature of Prohibition to prohibit the Respondents from conducting an inquiry and hearing against the Applicant if they fail to comply with order II above.**

**vi. That grant of leave granted hereinabove shall operate as a stay of execution of the Ruling of the Respondents delivered in PIC Case No. 31 of 2017 in so far as it related to the Orders issued therein that require the *ex parte* Applicant to establish a weekly schedule of CPD activities for maternity staff on emergency obstetric care for six months; initiate mediation with the complainant with a view to compensation and update the 1<sup>st</sup> Respondent within thirty days; payment of a fine of Kshs 300,000/= to the 1<sup>st</sup> Respondent within thirty days; and to review its consent form, pending the hearing and determination of the *ex parte* Applicant's substantive Notice of Motion or until further orders by this Court.**

**vii. The costs of the Chamber Summons dated 30<sup>th</sup> March 2020 shall be in the cause.**

**viii. The *ex parte* Applicant shall file and serve the Respondents and Interested Party with the Substantive Notice of Motion, a copy of this ruling, and a mention notice, within fourteen (14) days from today's date.**

**ix. Upon being served with the said pleadings and documents, the Respondents and Interested Party shall be required to file their responses to the substantive Notice of Motion within fourteen (14) days from the date of service.**

**x. Upon service of the Respondents' and Interested Party's response or default thereof, the *ex parte* Applicant shall file and serve it submissions on the substantive Notice of Motion within thirty (30) days.**

**xi. The Respondents and Interested Party are also granted leave to file and serve their submissions on the substantive Notice of Motion within thirty (30) days from the date of service.**

**xii. Judgment on this matter shall be reserved on 8<sup>th</sup> July 2020.**

**xiii. 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. 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.

xiv. 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.

xv. 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).

xvi. 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).

xvii. 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 Monday, 11<sup>th</sup> May 2020.

xviii. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 8<sup>th</sup> July 2020, and bring it to the attention of a Judge in the Division on that date for reservation of a judgment date.

xix. Parties shall be at liberty to apply.

21. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 11<sup>TH</sup> DAY OF MAY 2020

P. NYAMWEYA

JUDGE