



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. E1145 OF 2020**

**BETWEEN**

**GIBB AFRICA LIMITED.....APPLICANT**

**VERSUS**

**ENGINEERS BOARD OF KENYA.....RESPONDENT**

**RULING**

**The Application**

1. Gibb Africa Limited, the Applicant herein, has filed an application by way of a Chamber Summons dated 30<sup>th</sup> November 2020, seeking the following orders:

**1. THAT owing to the urgency of this Application, this Court be pleased to dispense with the Registrar's Notice in the first instance.**

**2. THAT this Court be pleased to grant the Applicant Leave to bring Judicial Review Proceedings against the Respondent by way of an Order of Certiorari, Prohibition and Mandamus.**

**3. THAT leave, once granted, shall be for the following orders:**

**a. THAT the Court be pleased to bring by way of *certiorari* into this court and quash the decision contained in the Respondents letter dated 2nd November 2020 to the Applicant.**

**b. THAT an order in the nature of *prohibition* do issue to prohibit the Respondent from taking any precipitate action against the *ex parte* Applicant on the basis of its letter dated 2nd November 2020.**

**c. THAT an order in the nature of *mandamus* do issue directed at the Engineers Board of Kenya commanding the said Engineers Board of Kenya to comply with the provisions of the Engineers Act, 2011 and the Engineers Rules, 2019 and register the *ex parte* Applicant as an engineering consulting firm.**

**4. THAT once granted, the said Leave do operate as a stay of the decision of the Respondent contained in its letter dated the 2nd November 2020.**

**5. THAT once granted, the Respondent be directed to forthwith register the *ex parte* Applicant as an engineering consulting firm.**

**6. THAT the costs of this Application be provided for.**

2. The grounds for the application are stated in the Applicant's statutory statement dated 30<sup>th</sup> November 2020, and a verifying affidavit sworn on the same date by Paul Karekezi, the Applicant's Managing Director.

3. In summary, the main grounds are that the Applicant submitted its application for registration as a consulting firm in compliance with the Engineers Act 2011 and Engineers Rules, 2019, and that the Respondent vide a letter dated 2nd November 2020 arbitrarily and capriciously declined to register the Applicant as an engineering consulting firm without a hearing, which has disenfranchised the Applicant and its employees the right to conduct consultancy services. Further, that the Respondent in making the said decision misconstrued the law, was unreasonable and considered irrelevant and/or improper considerations.

4. The Applicant annexed copies of various documents with details on its directors and employees, its operations, its application for registration as a consulting firm, and the Respondent's letter dated 2<sup>nd</sup> November 2020 declining to register it.

### **The Determination**

5. I have considered the application dated 30<sup>th</sup> November 2020 and the reasons offered in support of the urgency, and I am satisfied that the Applicant has demonstrated that this matter is urgent. This is for reason that the impugned decision is likely to affect the Applicant's operations.

6. On the orders sought by the 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.

7. 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. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) 1 WLR 780**, 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.

8. In the present application, the Applicant has provided evidence of the impugned decision made by the Respondent on 2<sup>nd</sup> November 2020, and of its operations as an engineering firm, and the grounds why it considers the said decision to be illegal. 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.

9. On the question of whether the said leave can operate as a stay of the impugned decision, 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.”**

10. 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.

11. 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. A similar decision was made by Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** .

12. 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.”**

13. It therefore follows 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.

14. In this regard, the decision by the Respondent was as follows:

**“The Board during its 179th ordinary meeting that was held on 26th October, 2020 could not recommend that Gibb Africa Limited be registered as an engineering consulting firm”.**

There may be other consequences arising from this decision that may have adverse effects on the Applicant's operations, and the decision is thus of a continuing nature. It is therefore prudent that the current *status quo* be maintained pending the hearing and determination of the Applicant's application. A stay of implementation of the said decision is therefore merited to this extent. This Court however notes that the Applicant has also sought an order of its registration at this stage, which is a final order that cannot be granted until its case is heard and determined *inter partes*.

### **The Orders**

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

**I. The Applicants' Chamber Summons application dated 30<sup>th</sup> November 2020 be and is hereby certified as urgent, and is hereby admitted for hearing *ex parte*.**

**II. The Applicant is granted leave to institute judicial review proceedings against the Respondent for an order of certiorari to bring into this Court into this court and quash the decision contained in the Respondents letter dated 2nd November 2020 to the Applicant.**

**III. The Applicant is granted leave to institute judicial review proceedings against the Respondent for an order of prohibition to prohibit the Respondent from taking any precipitate action against the Applicant on the basis of its letter dated 2nd November 2020.**

**IV. The Applicant is granted leave to institute judicial review proceedings against the Respondent for an order of mandamus directed at the Engineers Board of Kenya compelling the said Engineers Board of Kenya to comply with the provisions of the Engineers Act, 20 11 and the Engineers Rules, 20 19 and register the *ex parte* Applicant as an engineering consulting firm.**

**V. The grant of leave herein shall operate as a stay of any further implementation of the decision contained in the Respondents letter dated 2nd November 2020 to the Applicant, pending the hearing and determination of the Applicant's substantive Notice of Motion or until further orders of this Court.**

**VI. The Applicant shall file and serve the Respondent with (i) the substantive Notice of Motion, (ii) the Chamber Summons dated 30<sup>th</sup> November 2020 (iii) a copy of this ruling, and (v) a hearing notice, within fourteen (14) days from today's date.**

**VII. Upon being served with the said pleadings and documents, the Respondent shall be required to its response to the substantive Notice of Motion within fourteen (14) days from the date of service.**

**VIII. The Applicant's substantive Notice of Motion shall be heard on 2<sup>nd</sup> February 2021.**

**IX. 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 the written submissions filed by the parties.**

**X. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) and [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).**

**XI. 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).**

**XII. The parties shall also be required to file and send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).**

**XIII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 2<sup>nd</sup> February 2021.**

**XIV. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant by electronic mail by close of business on Thursday, 3<sup>rd</sup> December 2020.**

**XV. Parties shall be at liberty to apply.**

16. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 2<sup>ND</sup> DAY OF DECEMBER 2020

**P. NYAMWEYA**

**JUDGE**