REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC CIVIL APPLICATION NO. 400 OF 2015

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT (CAP 26) LAWS OF KENYA

AND

IN THE MATTER OF ARTICLES 22(1), (2), (A),(B),(C)

AND

23(1),27(1)(2) OF THE CONSTITUTION OF KENYA 2010)

IN THE MATTER OF THE HIGH COURTS SUPERVISORY JURISDICTION ARTICLE 165(5) 6, 7 CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF THE ORDER ISSUED ON 17TH SEPTEMBER 2015 IN CIVIL CASE NO. 228 OF 2015 AT KISUMU CHIEF MAGISTRATES COURT

BETWEEN

REPUBLIC ……...…….APPLICANT

VERSUS

THE CHIEF MAGISTRATE KISUMU.....……. RESPONDENT

***EX-PARTE*: MICAH KISOO**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 30th November, 2016, the *ex parte* applicant herein, **Micah Kisoo,** seeks the following orders:

1. **That Honourable court be pleased to issue order of certiorari to remove to this court to quash the orders dated 17/9/2015 issued in CMCC No. 228 of 2015 at Kisumu in particular but not limited to "that the Kenya Gazette Notice No. 5441 of 28/7/2015 and or any other gazette notice issued or any nomination of members to the Kenya Clinical officers Council that is not in compliance with the above stated process be and is hereby revoked and nullified forthwith.**
2. **Costs of this application.**

Ex Parte Applicants' Case

2. According to Applicant herein, **Micah Kisoo**, the Registrar Clinical Officers Council established under section 3(1) of the ***Clinical Officers (Training, Registration and Licensing) Act***, Cap 260, Laws of Kenya (hereinafter referred to as "the Act"), he caused to be published a notice of clinical officers council elections in the *Daily Nation* of Monday April 27, 2015, to be and indeed were conducted on the 13th May 2015 during the KCOA General meeting at Bontana Hotel Nakuru.
3. It was averred that Cabinet Secretary of health, in the exercise of the powers conferred by section 3(1) of the Act published Gazette notice No. 5441 date 28th July, 2015 making appointment of persons to serve in the council. However, on 13th November, 2015, the applicant was served with a court order dated 17th September, 2015 issued in Kisumu CMCC No. 228 of 2015 at Kisumu in which it was ordered *inter alia*:

> **"That the Kenya Gazette Notice No. 5441 of 28/7/2015 and or any other gazette notice issued or any nomination of members to the Kenya Clinical Officers Council that is not in compliance with the above stated process be and is hereby revoked and nullified forthwith."**

4. It was contended that the aforementioned orders were issued irregularly since the said Gazette Notice was never part of the pleadings in the aforementioned suit and the Cabinet Secretary of Health was never a party in the aforementioned suit. According to the applicant, the effect of the order is to paralyse the operation of the Clinical Officers council a regulatory body established under section 3(1) of the Act.
5. It was further contended that the orders issued were from a court without jurisdiction since the procedure of revoking and/or nullifying a gazette notice do not include moving the court by way of a plaint. It was further disclosed that the Attorney General, the Registrar Clinical Officers council and the Cabinet Secretary of health were never parties to a consent dated 2nd September, 2015.
6. To the applicant, it is in the interests of justice that this application seeking to quash the aforesaid orders dated 17th September, 2015 issued in Kisumu CMCC No. 228 of 2015 be granted as prayed.
7. It was submitted on behalf of the applicant that the Chief Magistrate's Court lacks the requisite jurisdiction to entertain suits that are couched in a manner of supervising statutory bodies hence the order dated 17th September, 2015 was issued in excess of jurisdiction.

Respondent's Case

8. In opposition to the application, the Respondent filed the following grounds of opposition:

> **1. That the Notice of motion application is defective has no merit and is based on a misconception of the law.**
>
> **2. That the consent orders dated 17th September 2015 in CMCC 228 of 2015 by the**

respondent was as a result of a consent adopted and recorded by the parties as a culmination of thorough and extensive proceedings in which the ex-parte applicant was represented and which decision was reached with consensus.

3. That the application offends the provisions of section 9(2) of The Fair Administrative Action Act, the legal principles of setting aside a consent order & exhaustion of alternative dispute resolution mechanisms and the only recourse available to the ex-parte applicants once an order is made is to either set aside on review or on appeal.

4. That further to the foregoing, the application offends the principle of alternative dispute resolution.

5. That there is no proof of any element of illegality, *ultra-vires*, bias, excess or lack of jurisdiction and ulterior motives hence the proceedings are proper and the ex-parte applicant does not meet the basic tenets for grant of judicial review orders.

6. That the application is an appeal disguised as a judicial review application yet a judicial review court does not sit as an appellate court so as to substitute its views with that of the respondent's court. The invoking of article 165(5) (6) (7) of the constitution does not in this case correctly fall within parameters of judicial review.

7. That with the exception of order 53 the provisions of Civil Procedure rules invoked on the face of the substantive motion are not applicable and do not confer jurisdiction on the court to grant the orders sought and render the application wholly incompetent.

9. It was submitted on behalf of the Respondent that there is no proof of any element of illegality, *ultra-vires*, bias, excess or lack of jurisdiction and ulterior motives on the part of the respondent hence the proceedings are proper and the *ex-parte* applicant does not meet the basic tenets for grant of judicial review orders.
10. The consent orders dated 17th September 2015 in CMCC 228 of 2015, it was contended, was as a result of a consent adopted and recorded by the parties as a culmination of negotiations in which the ex-parte applicant was represented and which decision was reached with consensus. Therefore all the respondent had to do was to basically adopt what the parties had agreed upon after the parties submitted themselves to the jurisdiction of the respondent court. To the respondent, a gazette notice can only be revoked through a court order or another gazette notice.
11. It was submitted that since there are other avenues of challenging the orders dated 17th September 2015, the application offends the provisions of section 9(2) of the ***Fair Administrative Action Act***. In the Respondent's view, there are well laid down legal principles of setting aside a consent order and if a party is dissatisfied by a decision of the court, he has the option of making an application to set aside the order or to appeal against it. Failure to do so defeats the principle of exhaustion of alternative dispute resolution mechanisms as judicial review should not be used as an appeal in clear disregard of the above mechanisms. It was therefore the Respondent's case that the instant application is an appeal disguised as a judicial review application yet a judicial review court does not sit as an appellate court so as to substitute its views with that of the respondent's court and that the invoking of article 165(5), (6) and (7) of the Constitution does not in this case correctly fall within parameters of judicial review. In support of this position the respondent relied on **Republic vs. Judicial Service Commission Ex-Parte Pareno (2004) 1 KLR 203** at 219 where **Nyamu J** (as he then was) while quoting the Supreme Court practice 1997 volume 53/1-14/14 stated thus;

"A judicial review court cannot also assume appellate jurisdiction…the court will not, however on judicial review application act as a court of appeal from the body concerned, nor will the court interfere in any way with the exercise of any power of discretion which has been conferred on that body, unless it has been exercised in a way which is not within the body's jurisdiction, or the decision is Wednesbury unreasonable.

The function of the court is to see that the lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law the court would, under the guise of preventing the abuse of power be guilty itself of usurping power".

12. The respondent also relied on **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828** which in his view recognized the available mechanism of setting aside or varying the order. It was further submitted that the application offends the principle of alternative dispute resolution as held by the Court of Appeal in **The speaker of the National Assembly vs. The Hon James Njenga Karume,Civil application No 92 of 1992** in which the court in addressing the issue of jurisdiction stated that:

> ***"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the civil procedure rules cannot oust clear constitutional and statutory provisions"***

13. **Further reliance was placed on the decision from the Supreme Court by Justice Mohammed Ibrahim in Yusuf Gitau Abdallah v Building Centre (K) Ltd & 4 others [2014] eKLR** to the effect that**:**

> **"A party cannot be heard to move a Court in glaring contradiction of the judicial hierarchical system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of appeal and review. A party cannot in total disregard of these fundamental legal redress frameworks move the apex Court".**

14. In the same vein, the respondent relied on the decision of the same Judge in ***Peter Oduour Ngoge vs. Hon. Francis Ole Kaparo, Supreme Court Petition 2 of 2012***, [para. 29-30] where the Judge stated as follows:

> ***"The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised and exhausted. In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court…*** **Consequently, this Court recognises that all courts have the constitutional competence to hear and determine matters that fall within their jurisdictions and the Supreme Court not being vested with 'general' original jurisdiction but only exclusive original jurisdiction in presidential petitions, will only hear those matters once they reach it through the laid down hierarchical framework".**

15. It was further submitted that with the exception of Order 53 of ***Civil Procedure Rules***, the provisions invoked on the face of the substantive motion are not applicable and do not confer jurisdiction on the court to grant the orders sought and render the application wholly incompetent.
16. The Respondent therefore submitted that the application was not merited and prayed that it be dismissed with costs to the respondent.

Interested Party's Case

17. On the part of the interested party he was averred that he filed Kisumu CMCC 22 of 2015 against the *ex parte* applicant and several other defendants after the *ex parte* applicant, being the register of the clinical officers' council allowed three officials of the Kenya Clinical Officers Association to illegally, unlawfully and in total contravention of the provision of and rules made under the Act organized to carry out prematurely the 9th Clinical officer's council elections thereby necessitating intervention by a court law. According to the interested party, among the deliberate omissions, irregularities and unlawful acts the ex parte applicant overlooked and or countenanced in allowing the three officials to conduct sham elections included:

    i. Allowing elections to be conducted after issuance of only a 16 day notice of the Election Day whereas rule 3(3) of the ***Clinical Officers (Training Registration & Licensing Election) Regulations 1992*** provides that a notice of at least 100 days ought to be given before elections

    ii. Allowing elections to go on without the *ex parte* applicant issuing a 60 day notice to the chairperson of the Kenya Clinical Officer Association to forward 4 names of persons nominated by each branch for election and subsequent appointment by the cabinet secretary to the clinical officers' council.

    iii. Allowing elections to go on whereas the *ex parte* applicant had not maintained a register of all members (clinical officers) eligible to participate in the election process contrary to section 6(3) of the act.

    iv. Allowing elections to go on yet various branches of the Kenya clinical officers association, namely Nairobi and Kisumu branch, had not elected delegates to represent them and vote at the elections

    v. Participating in and presiding over illegally convened elections.

18. Based on the forgoing, the interested party felt that the *ex parte* applicant was partial and was aiding the three official to stage-manage the election process in violation of the law and also acting in a manner to deny the members of the association the right to choose their preferred leaders inn a free and fair manner hence the institution of Kisumu CMCC 228 of 2015 to seek justice and forestall the *ex parte* applicant's illegal acts. It was contended that as Kisumu CMCC 228 of 2015 progressed, parties became conscious and remorseful of the elections irregularities above which were threatening to split the Kenya Clinical Officers Association and they agreed to record a consent dated 2nd September, 2015 to cure the above irregularities by the *ex parte* applicant to enable proper elections be conducted. The consent was adopted by the court hence the order issued by the court on 17th September, 2015.
19. In the interested party's view, by applying to court to quash the consent order adopted by the court on 17th September, 2015, the *ex parte* applicant is in effect asking this court of law to stand with, approve and uphold his said unlawful actions. Accordingly, the interested party prayed that this application be dismissed with costs as allowing it will plunge the association back into the chaos orchestrated by the *ex parte* applicant when he permitted the three officials to go on with sham elections in contravention of the law.
20. The interested party asserted that the judgment of the lower court in Kisumu in CMCC 228 of 2015, which the *ex parte* Applicant is seeking to quash vide this judicial review application is a consent judgment recorded by the trial Magistrate at the behest of parties in the suit. Whereas the Applicant was a party in Kisumu CMCC 228 of 2015 which is still ongoing and which is purely a civil private law matter, the ex parte applicant has not applied to set aside the consent judgment in the lower court case but has instead decided to jump into the arena of public law where judicial review is found. To the interested party, Kisumu CMCC 228/2015 is still ongoing and the Ex parte Applicant has a remedy in that case by way of either applying to the court to have the consent judgment set aside and or appealing against it. The filing of this judicial review application was thus unnecessary and it should be dismissed with costs.
21. In the interested party's view, the law on challenging consent judgments is well settled and for a

party to succeed he must prove fraud, mistake or misrepresentation, particulars of which must be specifically pleaded and proved by way of *viva voce* evidence. In this case, however, this will not be possible where parties will proceed by way of affidavit evidence. In his view, to effectively challenge the consent judgment entered by the court in Kisumu CMCC 229 of 2015, the *ex parte* Applicant will have to call *viva voce* evidence to enable the court make a factual determination on whether entry of consent judgment by the court was by way of a mistake, as a result of fraud and or misrepresentation and by so doing, the court will inevitably have to delve into the merits of the case. In any case, it has been held by the courts that fraud, mistake or misrepresentation cannot be proved in a judicial review application and that it can only be done in a civil case where oral evidence can be adduced. To him, whereas judicial review comes into play were orders sought to be quashed were actually made by public body acting in that capacity, in this current case, the impugned consent order emanated from the parties and all the court did was to merely record it and adopt it. It is thus not possible to fault the manner in which the court made the order if the order emanated from the parties by way of consent.

22. The interested party's position was the averments in the *ex parte* applicant's supporting affidavit were untrue because the impugned order in fact directs that status quo be maintained and the current officials of the Kenya Clinical Officers Association (hereinafter referred to as 'the KCOA" or "the Association" or "the Society") and the 8th Kenya Clinical Officer's Council continue in office until completion of the processes highlighted in the order. It is thus not true that the operations of the clinical officer's council are paralysed.
23. It was submitted on behalf of the interested party that the effect of allowing this application would be to legitimise the illegal elections which were conducted by the ex parte applicant in which the applicant aided 3 officials of KCOA to stage manage the election process and deny other members of the Association the opportunity to choose leaders of their choice. To the interested party the effect of granting the orders sought herein would be to split the KCOA since the effect of the consent was to give a road map by forestalling the said split and maintain the *status quo ante* the said illegal action.
24. The Court was urged to consider the fact that the proceedings in which the impugned order was granted are still alive and the ex parte applicant has not exhausted the remedies available to him therein such as the setting aside of the said consent. These proceedings were therefore termed by the interested party as amounting to an abuse of the Court process.
25. It was submitted based on **Flora Wasike vs. Destimo Wamboko [1982-88] 1 KAR** that a consent order can only be set aside on grounds which would justify setting aside of a contract a process which would require viva voce evidence and cross examination.
26. It was submitted that contrary to the allegation of the *ex parte* applicant, the consent order would not lead to a lacuna in the affairs of the Association since the *status quo ante* would be reverted to. It was contended that the actions of the applicant amounts to intermeddling in the affairs of the KCOA and is not in the interest of the Society. To the contrary it is meant to plunge the KCOA back into chaos and hence the application ought to be dismissed with costs.

Determination

27. I have taken into account the foregoing as well as the submissions filled herein.
28. This dispute revolves around the propriety of the consent order made by the Chief Magistrate's Court, Kisumu in CMCC No. 228 of 2015. According to the ex parte applicant, the said consent order whose effect was to quash the Gazette Notice No. 5441 which was published by the Cabinet Secretary for Health was entered into without the said Cabinet Secretary being afforded an opportunity of being heard in this matter.
29. On 14th December, 2015, this Court directed that the said Cabinet Secretary be served. There is an affidavit of service sworn by **Christopher Muthui** and filed herein on 23rd February, 2016 in which it is deposed that the respondent and the interested party were served by post. There is no other affidavit on record evidencing service upon the said Cabinet Secretary. That notwithstanding, it is trite that Cabinet Secretaries are represented in legal proceedings by the Attorney General who appeared for the respondent herein. It is however noteworthy that the Attorney General opposed the grant of the orders herein. That would mean that the Attorney General, the Chief legal adviser of the Government including the ministries that fall thereunder, is

contented with the orders granted herein. It is accordingly my view that nothing turns upon the allegation that the Cabinet Secretary was never afforded an opportunity of being heard before the impugned order was made assuming that allegation is correct.

30. That leads me to the next issue. From the copy of the order exhibited herein, it would seem that the consent was signed by "both parties". Whereas it is clear that there were more parties than two, the consent does not indicate who these "both parties" were. One of the parties to the said proceedings was the ex parte applicant herein. Whereas the ex parte applicant contended that he was not a party to the said consent the respondent contended that the ex parte applicant was a party to the negotiations which culminated into the recording of the said consent. Without the consent itself being exhibited this Court cannot state with certainty in light of the conflicting averments, which of the parties executed the said consent.
31. With respect to the powers of the Respondent to grant the orders it granted, it is clear that what the Respondent did was to adopt the consent as an order of the Court. It is however clear that even where parties have executed a consent, it does not automatically follow that the Court is bound to adopt the same. In **Destro and Others vs. Attorney General [1980] KLR 77; [1976-80] 1 KLR 1590, Simpson, J** (as he then was) expressed himself as follows:

> **"The primary rule is that no waiver of rights and no consent or private bargain can give a public authority more power than it legitimately possesses. Once again the principle of *ultra vires* must prevail when it comes into conflict with the ordinary rule of law."**

32. In other words, parties cannot by consent give jurisdiction to the Court where such jurisdiction does not exist. *A fortiori* parties cannot in a matter in which the Court has jurisdiction record a consent whose effect would be to remove the matter from the jurisdiction of the Court.
33. That said, since the proceedings before the Subordinate Court are still ongoing and the applicant contends that it was not a party to the said consent, nothing bars the applicant from moving that Court to have that order set aside. It ought to be appreciated that judicial review is a remedy of last resort. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

> **"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute."**

34. It was similarly held in In **Republic vs. National Environment Management Authority [2011] eKLR**, it was held that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The Court of Appeal had this to say at page 15 and 16 of its judgment:

> **" The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure**

was suitable to determine it. – see for example R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD case. The Learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute with respect we agree with the judge."

35. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in **Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425,** where it held that;

> **"In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed**."

36. Therefore confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant's grievance. In other words the Court ought to consider whether the alternative remedy is less convenient, beneficial and effectual. That was also the position in the English case of *Ex parte* **Waldron [1986] 1QB 824 at 825G-825H,** where **Glidewell LJ** observed that the court should always interrogate relevant factors to be considered when deciding whether the alternative remedy would resolve the question at issue fully and directly.
37. It is now therefore a cardinal principle that, save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy. In **Re Preston [1985] AC 835 at 825D Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort.
38. Section 9(2), (3) and (4) of the ***Fair Administrative Action Act***, No. 4 of 2015 provides:

> ***(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.***
>
> ***(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).***
>
> ***(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.***

39. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. In this case the applicants have not shown why the Court ought to exempt him from the available remedy for setting aside consent orders.

Order

40. Having considered the issues raised herein, I hereby find that these proceedings were prematurely instituted. In the premises the Notice of Motion dated 30th November, 2016 is incompetent and is hereby struck out with costs to the respondent and the interested party.

Dated at Nairobi this 19th day of July, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Prof Wangai for the applicant

Mr Munene for Mr Odhiambo for the Respondent

Mr Otieno for the interested party

Cc Patricia