



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)**

**CIVIL APPEAL NO. 22 OF 2013**

**BETWEEN**

**IN THE MATTER OF AN APPLICATION BY MUKHONYE COMMUNITY BASED  
ORGANISATION**

**AND**

**IN THE MATTER OF THE MINISTRY OF PUBLIC HEALTH**

**AND**

**IN THE MATTER OF THE WESTERN PROVINCE DIRECTOR OF PUBLIC HEALTH AND  
SANITATION NOTICE DATE 25-5-2012**

**AND**

**IN THE MATTER OF THE REGISTERAR OF CLINICAL OFFICERS COUNCIL**

**AND**

**IN THE MATTER OF THE CLINICAL OFFICERS COUNCIL CAP 260 LAWS OF KENYA**

***(Appeal from a Ruling of the High Court of Kenya at***

***Busia (Kimaru, J) dated 27<sup>th</sup> June 2013***

**in**

**BUSIA HC MISC APP No. 130 OF 2012**

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**JUDGEMENT OF THE COURT**

This appeal has been brought by Mukhonye Community Based Organization, an entity registered under what was formerly known as the Ministry of Gender, Children and Social Development. It is now probably within the current Ministry of Sports Culture and Arts. One of its officials at the time or times relevant to this litigation was one Elphas Okwayo Makeya who described himself as the secretary of the

Organization hereinafter “the appellant”.

The appeal arose as follows:

The appellant used to operate a health facility known as Delinds Medical Centre in Butula District within Busia County. On 10<sup>th</sup> May 2012 a team from the office of former Western Provincial Director of Public Health and Sanitation inspected the appellant's said facility. The team comprised Dr. Ahindikha Q.B, the Provincial Director of Public Health and Sanitation, Mr. Absalom Ingabo, the Provincial Clinical Officer, Mr. Zablon Onyango, the Public Health Officer from the Director's office and Mr. Douglas Bwire the District Nursing Officer from Butula District.

Following that inspection, a report was prepared dated 25<sup>th</sup> May, 2012 in which the following recommendations were made:

- “1. Delinds Medical Centre should not be licensed to offer medical services.**
- 2. The District Health Management Team (DHMT) Butula District and the Provincial Administration to enforce the closure of the clinic.**
- 3. Further investigations by the DHMT in the allegations and malpractices at the facility and report to this office within two weeks for necessary action.”**

Copies of the inspection report were sent to the Permanent Secretary Ministry of Public Health and Sanitation, the District Commissioner Butula District and one Reuben Simiyu Sindani of Delinds Medical Centre.

Pursuant to the said inspection, the appellant's facility was closed. On 8<sup>th</sup> June, 2012, the secretary of the appellant wrote to the Provincial Director of Public Health and Sanitation complaining about the recommendations made in the inspection report and sought a review of the same.

As no review occurred, the appellant moved to the High Court at Busia and, relying on Order 53 Rules 1, 2 and 4 of the Civil Procedure Rules, lodged a chamber summons - ex-parte, seeking leave of the court to apply for judicial review orders of certiorari, prohibition and mandamus. The prayers were expressed as follows:

- “2. That leave be granted to the applicant to apply for an order of Judicial Review in the nature of a certiorari to remove into the High Court and quash the decision of the Western Provincial Director of Public Health and Sanitation contained in his letter to the applicant dated 25/5/12.**
- 3. That leave be granted to the applicant to apply for an order of prohibition directed [to] Western Province (sic) Director of Public Health and Sanitation restraining him from closing the applicants health clinic known as DELINDS MEDICAL CENTRE in Butula District.**
- 4. That an order of mandamus compelling the Registrar of the Clinical Officers Council to issue the applicant with a license for private medical practice for its clinic known as Delinds Medical Centre in Butula District Busia County.**
- 5. That the applicant seeks that if leave is granted the same to operate as a stay of the decision of the Western Provincial Director of Public Health and Sanitation dated 25/5/12.”**

The Chamber Summons was placed before **Kimaru J**, on 24<sup>th</sup> July, 2012 who certified the same as urgent and ordered the hearing of the application inter partes. The inter partes hearing eventually happened on 10<sup>th</sup> October, 2012 after all parties had filed various affidavits upon which they relied.

The learned Judge, in a ruling he prepared and signed, but was delivered by **Tuiyot J**, on 27<sup>th</sup> June, 2013 declined the leave sought by the applicant concluding as follows:

**“From the contents of the letter that is the subject of this application it was clear that the said clinic was being operated by persons who were not qualified to offer medical services. Among the persons is Elphas Okwayo Makeya, who claims to be the secretary of the Applicant. He has no medical training neither does he have any academic qualifications that would make him a suitable person to manage a health facility. It was apparent to this court that it is the said Elphas Okwayo**

**Makeya who in fact was operating the medical clinic under the guise that it was owned by the community based organization.**

**In such circumstances can this court grant leave to an unqualified person to challenge the decision of an officer mandated by the law to safeguard the interest of the public from acts of unqualified persons. I do not think so. The applicant failed to establish that it has a prima facie case to entitle this court grant leave to institute judicial review. The applicant has no locus standi to challenge the decision of the respondent. In fact it is apparent that the name of the Applicant is being used by the persons who filed this application to enable them engage in medical practice when in actual fact they are unqualified to offer such medical services or to be issued with a licence to offer such medical services. Leave is declined. The Applicant shall pay the costs of the Respondent.”**

It is against that refusal to grant leave to seek judicial review orders that this appeal was brought. The appellant has cited six grounds namely that:-

- “1. The learned trial Judge grossly misdirected himself in dismissing the applicant's chamber summons dated 23-7- 2012 without any valid, sound cogent and or legal reasons.**
- 2. The learned trial Judge erred in both law and fact in failing to grant leave to the applicant to apply for orders of judicial review in the nature of certiorari and prohibition.**
- 3. The Judge erred in law and fact in failing to appreciate that the applicant was deserving of the orders of leave to apply for judicial review.**
- 4. The Judge erred in law and fact in failing to find that the applicant had an arguable case and a prima facie case for granting the leave sought.**
- 5. The Learned trial Judge erred in both law and fact in failing to consider the petitioner's submission while arriving at the decision.**
- 6. The ruling was against the weight of evidence.”**

In his submissions before us, **Mr. Odeny**, learned Counsel for the appellant faulted the ruling of the learned Judge of the High Court on various grounds, the gist of which was that the appellant placed sufficient material before the Learned Judge to demonstrate an arguable case for the granting of leave.

**Mr. Onyiso**, learned counsel who represented the respondents, the Ministry of Public Health and Sanitation, The Western Provincial Director of Public Health and Sanitation and the Clinical Officers Council, in his response, submitted that the learned Judge found that the appellant was not acting in good faith in making its application as its Chief architect, Elphas Okwayo Makeya, was using the appellant for personal gain. Its counsel's view, that the report upon which the appellant's clinic was closed militated against granting the appellant a licence to operate a health facility.

On the issue of whether to grant or not to grant leave, this Court differently constituted stated as follows in **Njuguna & others v= Minister for Agriculture [2001] 1EA (CAK)**:

**“It cannot be denied that leave should be granted, if on the material available, the court considers without going into the matter in depth, that there is an arguable case for granting leave.”**

So, all an applicant for leave to commence judicial review proceedings should show is that he has an

arguable case. If he satisfactorily persuades the Judge hearing the application, the judge should grant leave without going into the matter in depth.

In the matter before us, **Kimaru J**, had the correct criterion in mind, when he considered the appellant's application. He indeed cited the test set out in the case of **Njuguna =v= Ministry of Agriculture (supra)**. He also invoked the decision of the Ugandan Court of Appeal in the case of **Kikonda Butema Farms Ltd =v= The Inspector General of Government, Civil Appeal No. 35 pf 2002 UR**. He cited the following passage from that case.

**“An application for leave is the first step in the process. The trial Judge is enjoined to look at the statement of facts, the accompanying affidavit and annexures that might be attached to the application before granting leave. It is not necessary at that stage to consider whether the applicant would succeed or not. The applicant has to present such facts that would satisfy court that a prima facie case exists for leave to be granted. In my view leave is not granted as a matter of course. However the court is not supposed to consider the merits or**

**demerits of application. Such decision can only be taken after hearing the application inter parties.”**

Having set out the correct test, did the learned Judge apply it to the matter before him? The learned Judge correctly appreciated that the appellant sought leave on the primary basis that its constitutional right to a fair hearing had been infringed. He also appreciated that if demonstrated, such a complaint required investigation by the court by way of judicial review. The Learned Judge however, found that the appellant was being used as a cloak by its secretary to operate an illegal health facility.

Was there basis for that finding? Before the learned Judge, was the inspection report of the team from the Provincial Public Health Director's office which showed that the appellant's health facility was ill equipped and grossly inadequately staffed. And even the threadbare staff members were not qualified to operate the health facility. We have considered the same material which was placed before the High Court including the response to the inspection report made by the appellant's secretary. Having done so, we cannot fault the learned Judge of the High Court. In an attempt to demonstrate that the appellant's health facility was run by qualified personnel its secretary exhibited

academic qualifications of various personnel. However, save for Reuben Simiyu Sindani, the said secretary did not exhibit letters of appointments for the people he alleged were working for the health facility.

The record also shows that save for attempting to address the issues of personnel which, as we have pointed out, was not successful, the said secretary did not address the other shortcomings stated in the inspection report. No previous licence in the name of the appellants was exhibited. No patient records were shown and none are included in this record; a charge of malpractice in the management of patients was not answered. The want of financial records and dispensing of expired drugs were not responded to.

The appellant did not therefore answer the complaint of operating illegally by persons who were not qualified and without infrastructure for rendering medical services to the public. The learned Judge could not ignore those factors. As stated, in both cases cited above, the granting of leave to commence judicial review proceedings is not a matter of course. The court is enjoined to look at the statement of facts, the accompanying affidavit, any annexures exhibited and any submissions made before granting leave.

Like the learned trial Judge, having considered the material which was placed before him, we find that the appellant failed to demonstrate an arguable case to entitle him obtain the leave to commence judicial review proceedings.

In the result the appeal is for dismissal in its entirety and we so order. Costs of the appeal shall be paid to the respondent by the appellant.

*Dated and Delivered at Kisumu this 7<sup>th</sup> day of February, 2014.*

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**