



**Kambona & another v Cabinet Secretary for Ministry of Health & 2 others; Kenya
Nutritionalist and Dietician Institute & 8 others (Interested Parties) (Judicial
Review E009 of 2022) [2022] KEELRC 12792 (KLR) (3 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12792 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW E009 OF 2022**

**JK GAKERI, J
OCTOBER 3, 2022**

BETWEEN

OSCAR AYOMA KAMBONA 1ST APPLICANT

BROWN ASHIRA OLALY 2ND APPLICANT

AND

CABINET SECRETARY FOR MINISTRY OF HEALTH 1ST RESPONDENT

**KENYA HEALTH PROFESSION OVERSIGHT AUTHORITY ... 2ND
RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

AND

**KENYA NUTRITIONALIST AND DIETICIAN INSTITUTE INTERESTED
PARTY**

**KENYA MEDICAL LABORATORY TECHNICIANS AND TECHNOLOGISTS
BOARD INTERESTED PARTY**

**KENYA NUTRITIONALIST AND DIETICIANS INSTITUTE INTERESTED
PARTY**

NURSING COUNCIL OF KENYA INTERESTED PARTY

CLINICAL OFFICER COUNCIL INTERESTED PARTY

PHARMACY AND POISONS BOARD INTERESTED PARTY

**KENYA MEDICAL PRACTITIONERS AND DENTIST
COUNCIL INTERESTED PARTY**

KENYA NUCLEAR REGULATORY AUTHORITY INTERESTED PARTY



RULING

1. By a Chamber Summons Application dated April 20, 2022 filed under certificate of urgency, the ex-parte applicants seeks the following Orders:-
 - i. Spent.
 - ii. That leave be granted to the ex-parte Applicants to apply for the following orders of Judicial Review.
 - a. An order of certiorari to bring into this honourable court and Quash the decision of the Cabinet Secretary for Ministry of Health contained in Gazette Notice Number 2975 dated February 28, 2022 appointing Manaseh Bocha and Eunice Njeri Tole to be members of the Board of the Kenya Health Professional Oversight Authority, for a period of three (3) years, with effect from the March 4, 2022.
 - b. An order of Mandamus to compel the 1st Respondent to gazette and appoint persons as was recommended by the regulatory bodies established under the Act of parliament.
 - iii. That the grant of leave in prayer 2 (a) and (b) do operate as a stay of the implementation of Gazette Notice 2975 dated February 28, 2022 purporting to appoint Manaseh Bocha and Eunice Njeri Tole as members of the board of Kenya Health Professionals Oversight Authority for a period of three (3) years, with effect from the March 4, 2022.
 - iv. That costs of this Application be provided for.
2. The Chamber Summons Application is expressed under Order L III Rules 1 and 2 of the [Civil Procedure Rules, 2010](#) and is based on the statutory statement dated April 20, 2022 which sets out the grounds upon which the reliefs are sought and an Affidavit verifying the statement sworn by Oscar Ayoma Kambona who depones that he is a member of the Council, registered licensed by the Kenya Nutritionists and Dieticians Institute and the 2nd Applicant is registered and licensed by the Public Health Officer and Technicians Council.
3. That the interested parties are health regulatory bodies established by law.
4. The Affiant states that section 46 of the [Health Act](#) provides for the membership of the Kenya Health Profession Oversight Authority (KHPOA) which includes two representatives nominated by the health regulatory bodies established under the Act of Parliament.
5. That on January 22, 2019, the Department of Standards Quality Assurance and Regulatory bodies met at the Pharmacy and Poisons Board offices and the process to nominate representatives to the KHPOA was initiated as evidenced by minutes of the meeting of even date.
6. The Affiant further states that the meeting declared that representatives of the 1st and 2nd interested parties as such representation to the Board of the Authority.
7. That the returning officer advised that the two boards, Kenya Nutritionist and Dieticians Institute (KNDI) and Kenya Medical Laboratory Technicians and Technologists Board (KMLTTB) to submit two (2) names each together with the respective Curriculum Vitae to the Cabinet Secretary of Health for appointment.



8. That the 1st and 2nd Interested Parties were nominated through a resolution adopted by all members present and Mr Manaseh Bocha was present and was not selected as a representative neither was Eunice Njeri Tole and the Cabinet Secretary for Health acted ultra vires.
9. That on March 8, 2019, the 1st Respondent wrote to the 1st and 2nd Interested Parties that they lacked functional boards/councils to execute their mandate and were thus disqualified.
10. That on March 21, 2019, the 1st Interested Party wrote to the 1st Respondent on the issue of the nomination citing the fact that the Advisory Department had invited the 1st and 2nd Interested Parties to participate in the nomination exercise at a meeting attended by all Boards/Council representatives.
11. The affiant further states that at a meeting held on July 17, 2019, 10 CEOs/Registrars of regulatory bodies resolved that;
 - i. CEOs/Registrars be the representatives since they oversaw the day to day running of their organizations.
 - ii. Representatives to be registered and licensed health professionals in good standing.
 - iii. Representatives to serve the interests of all regulatory bodies.
 - iv. The names of Dr David Okeyo from the 1st Interested Party Kenya Nutritionist and Dieticians Institute (KNDI) and Patrick Kisabeli from the 2nd Interested Party Kenya Medical Laboratory Technicians and Technologists Board (KMLTTB) be submitted.
 - v. The two to present their Curriculum Vitae to the Chairperson by close of business the same day.
12. The 1st and 2nd Interested Parties have properly constituted boards and the 1st Respondent was bound to exercise powers under the [Health Act](#).
13. The Affiant states that on February 28, 2022, vide Gazette Notice Numbers 2975, the Cabinet Secretary for Health appointed Manaseh Bocha and Eunice Njeri Tole to the Board of the KHPOA for a period of 3 years effective March 4, 2022 contrary to section 46(1)(e) of the [Health Act](#) which envisions representatives nominated by the Interested Parties established Under an Act of Parliament. That Mr Manaseh Bocha and Eunice Njeri Tole were not nominated by the regulatory bodies and the appointment was not subject to fair competition and thus contrary to the provisions section 5 of the [Fair Administrative Actions Act](#) and Article 10, 41 and 233 of the [Constitution](#) of Kenya, 2010 and thus illegal.
14. The Affiant depones that the appointments were opaque, unilateral, illegal and unconstitutional.
15. Finally, the Affiant states that it is just and equitable that the decision of the Cabinet Secretary for Health be quashed.
16. The Chamber Summons Application came up before Maureen Onyango J on April 22, 2022. The court certified the matter urgent and granted leave to commence Judicial Proceedings. The judge fixed the inter parties hearing of the prayer for leave to operate as stay on May 11, 2022 and ordered service on the Respondents.



Respondent's grounds of opposition

17. The Respondents contend that the decision to grant or deny of stay is an exercise of judicial discretion. The court is urged not to exercise its discretion in favour of the Applicants as the decision sought to be quashed had already been implemented in March 2022 and there is nothing to be stayed as held in *George Philip M Wekulo V The Law Society of Kenya & another HC MISC A No 29 of 2005* (Kakamega).
18. That this is a matter of public interest which is an overriding factor in the determination of whether or not to grant stay orders as was held in *Munir Sheikh Ahmed V Capital Markets Authority* (2018) eKLR.
19. That the order would not be efficacious as it will cripple operations of the authority, government and the public at large. That public interest outweighs the personal interest of the applicants who stand to suffer no prejudice if stay order is not granted and they have not demonstrated any prejudice likely to be suffered.
20. The Respondents urge that the stay order is discretionary and its scope and purpose is limited and can only be granted in the most deserving cases.
21. It is urged that there is no valid pending Judicial Review proceedings before the court under Order 53 Rule 3 of the Civil Procedure Rules, 2010.
22. The Respondents urge that the prayer for leave to operate as a stay be dismissed.

7th Interested Party's grounds of opposition

23. In its grounds of opposition dated June 3, 2022, the 7th interested party, the Kenya Medical Practitioners and Dentist's Council contend that the appointment of members of the board of the 2nd Respondent has already been implemented.
24. That it is trite that orders for stay cannot be granted to quash an order that has already been affected.
25. That since the decision has already been implemented, the substantive matters arising ought to be canvassed in the substantive application for judicial review.
26. That the applicants have not demonstrated any prejudice or substantial loss they stand to suffer if the order for stay is not granted.
27. The 7th Interested Party prays for dismissal of the application for leave to operate as stay.

Applicant's submissions

28. As to whether leave granted to the applicants should operate as stay of the Respondents decision in Gazette Notice No 2975, the applicants urge that the applicable law is Order 53 Rule 1 (4) of the Civil Procedure Rules which confer upon the Court discretion to direct that the leave granted shall operate as a stay and the same should be exercised judiciously.
29. The applicants urge the court to grant the prayer on the premise that;
 - i. The appoints were not subjected to competition and merit.
 - ii. The nominations were not made by regulatory bodies as envisaged by the Act.
 - iii. The appointments were made in contravention of Articles 10 and 233 of the *Constitution*.



30. No judicial authority is relied upon to buttress the submissions.

Respondents' submissions

31. The Respondents submit that since the Gazette Notice has already been implemented, the same cannot be stayed, though the court has jurisdiction to quash the same if found to have been issued in contravention of the law.
32. It is the Respondents submission that stay orders are only efficacious where the decision has not been implemented or the decision is in the course of implementation.
33. The decisions in *R V Capital Markets Authority ex parte Joseph Mumo Kavai and another* as well *Jared Benson Kangwana V Attorney General HCCC No 446 of 1995* are relied upon in support of the submission.
34. The Respondents urge that if the decision sought to be quashed has been fully implemented, leave ought not to operate as stay as the order is no longer efficacious. There may be nothing to stay.
35. That the matter herein is one of public interest and the order of stay ought not be granted. Extensive reliance is made on the decision in *Munir Sheikh Ahmad V Capital Market Authority (Supra)* to underscore the basis on which the court should exercise its discretion.
36. Secondly, the Respondents contend that there are no valid judicial proceedings before the court as required by Order 53 Rule 3 of the Civil Procedure Rules, 2010 that a party ought to file the Notice of Motion Application within 21 days of grant of leave to commence Judicial Review proceedings.
37. That leave was granted on 22nd April and the substantive Notice of Motion was served via email on June 2, 2022 out of time and without leave of the court and no reason has been provided for the non-compliance with the timelines.
38. It is submitted that Order 53 Rule 3 (i) is couched in mandatory terms and the 21 days limit by the sub-rule cannot be extended by the court. Reliance is made on the decision of HPG Waweru J in *Salome Kendi V County Government of Laikipia and another 2021 eKLR* where the Judge relied on the decision in *Republic V Mer Security and Communications System Ltd/Megason Electronics and Control 1978 JV* and another (Interested Party) Ex Parte M (unreported) to uphold the position that Order 53 Rule 3 (i) must be complied with and the timeline cannot be extended under Order 50 Rule 6 The court held that it had no jurisdiction to extend time.
39. Finally, the Respondent submits that although the court granted leave to the Applicants to commence Judicial Review Proceedings, the applicants did not take advantage of the leave and are guilty of abuse of court process and delay.
40. It is submitted that there are no proceedings before the court to allow for an order of stay to be granted.
41. That the prayer for leave to operate as stay should be dismissed with costs.

Submissions by the 7th Interested Party

42. As to whether leave to commence judicial review proceedings ought to operate as a stay, it is urged that it is trite law orders for stay cannot be granted to quash an order that has already been implemented and the application was brought to court late since the appointment of board members took effect on March 4, 2022 and the application is dated April 20, 2022 and no explanation has been provided.



43. Reliance is made on the decision in *James Opiyo Wandayi V Kenya National Assembly & 2 others (2016) eKLR* where the court considered the principles that guide the grant of stay orders. As is the Supreme Court decision in *Mulraj V Murti Ragbonathji Maharaj (1967) AIR 1386* where the court was emphatic that

' An order of stay does not undo anything which has been done. Its utmost effect is to stop further action in the direction of execution.

44. As regards the prejudice or substantial the Applicants are likely to suffer, it is submitted that the Applicants have not met the threshold.

45. Reliance is made on the decision in *Republic V National Transport and Safety Authority & 10 others (2014) eKLR* where the court addressed the threshold for obtaining leave to commence Judicial Review Proceedings and grant of an order of stay. The court held that the latter was higher.

46. The 7th Interested Party submits that the Applicants have not provided evidence of the prejudice or harm they stand to suffer if the order for leave to operate as stay is not granted.

47. The court is urged to dismiss application for leave to operate as a stay.

Determination

48. The singular issue for determination is

i. Whether the leave granted to the applicants should operate as a stay of the Gazette Notice No 2975.

49. The applicable law on whether leave so granted should operate as a stay is Order 53 Rule 1 (4) of the Civil Procedure Rules.

50. Order 53 Rule 1 (4) provides as follows:

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.

51. Similarly, Order 53 Rule 3 provides that:

1. When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty one days by notice of motion to the High Court, and there shall, unless the Judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

52. In the instant case, while the court granted leave to the applicants to commence Judicial Review Proceedings against the Respondents, it did not direct that the leave shall operate as a stay.

53. This is the application before the court.

54. It is common ground that the power to grant or deny stay is an exercise of judicial discretion. The court may grant the order or refuse to do so but must act judiciously (see Odunga J in *Republic V Cabinet Secretary for Transport and Infrastructure and 5 others Ex parte Kenya Country Bus Owners Association (Thuo Paul G Muthumbi Chairman), Samuel Njuguna Secretary Joseph Kirimi Treasurer & 8 others (2014) eKLR*).



55. In exercise of judicial discretion to grant or decline an application for leave to operate as a stay, the court is guided by several factors.
56. First, the purpose of leave operating as stay is to halt or suspend the proceedings that are challenged in court. The underlying object of leave operating as stay is to preserve the status quo pending the final determination of the claim for judicial review (see Nyamweya J in *Republic V National Hospital Insurance Fund Management Board Ex parte Patanisho Maternity and Nursing Home (2019) eKLR*).
57. Second and critically important is whether or not the decision sought to be stayed has been fully implemented. In *Jared Benson Kangwana V Attorney General (Supra)*, the court held that a stay should be granted if the decision which ought not to have been made may be made.
58. This circumstance was also explained in detail by Dyson LJ In *R (H) V Ashworth Special Hospital Authority (2003) 1 WLR 127* where learned explained different scenarios such as where the decision has not been made or if it has been made but not implemented and if it has been implemented.
59. The Judge expressed himself as follows;
- ' I would hold that the court has jurisdiction to stay the decision of a tribunal which is subject to a judicial review challenge even where the decision has been fully implemented. But the jurisdiction should be exercised sparingly, and where it is exercised, the court should decide the judicial review application, if at all possible within days of the order of stay.'
60. The court is guided by these sentiments.
61. In this case, the Respondents urge that the decision sought to be quashed has been fully implemented and there is nothing remaining to be stayed in that Gazette Notice No 2975 appointed Manaseh Bocha and Eunice Njeri Tole members of the Board of the Kenya Health Profession Oversight Authority for 3 years effective March 4, 2022 and they have been serving as directors.
62. In *George Philip M Wekulo V Law Society of Kenya and another (2005) eKLR GBM Kariuki J* expressed himself as follows:
- ' As to whether the leave herein granted should operate as a stay, the decision sought to be quashed has already been implemented and the applicant's name has been removed from the Roll of Advocates. If the Applicant is eventually successful in having the decision quashed, his name shall be restored on the Roll of Advocates. In short, there is nothing to be stayed.'
63. The same may be said of the instant case.
64. The third factor is public interest which the Respondents mention in their grounds of opposition and submit on urging that the order of stay should not be granted.
65. In *Munir Sheikh Ahmed V Capital Markets Authority (2018) eKLR*, Nyamweya J stated as follows;
- ' The second factor that comes to play in the exercise of discretion whether or not to grant a stay in judicial review proceedings is that of the public interest. The public interest as an overriding factor when determining whether or not to grant stay orders was explained by Majanja J in *R V Capital Markets Authority Ex-parte Joseph Mumo Kivai and another* where the learned Judge held that judicial review proceedings are Public Law proceedings for vindication of private rights and for this reason, public interest is a relevant consideration in the granting of stay orders. The public interest element in the grant of a stay was also the



subject of discussion in *R (H) V Ashworth Special Hospital Authority* that the court can refuse to order that leave granted for orders of judicial review does operate as a stay where such a stay would violate the needs of good administration.'

66. In *James Opiyo Wandayi V Kenya National Assembly and 2 others (Supra)*, the court emphasized that where the decision sought to be stayed has already been implemented, leave ought not operate as a stay as it is no longer efficacious and there may be nothing to be stayed. In the instant case, it is common ground that the Cabinet Secretary for Health appointed Mr Manaseh Bocha and Eunice Njeri Tole as board members of KHPOA vide Gazette Notice No 2975 dated February 28, 2022 for a term of three (3) years effective March 4, 2022 and they have been serving as such. The decision was made and has been implemented.
67. The Respondents urge that a grant of the order of stay at this stage would not be in the public interest as it would cripple the operations of the Kenya Health Professional Oversight Authority and the applicants stand to suffer no prejudice.
68. It is not in dispute that the applicants have not demonstrated the actual prejudice they stand to suffer if leave does not operate a stay.
69. Having demonstrated that the decision sought to be quashed has already been implemented and the matter is one of public interest, the court proceeds as follows.
70. The first issue for determination is whether there are valid judicial review proceedings before the court.
71. In their grounds of opposition and submissions, the respondents maintain that there are no valid judicial review proceedings before the court to justify the grant of the prayer sought.
72. It is the Respondents submission that the applicants have not complied with the requirements of Order 53 Rule 3(1) of the Civil Procedure Rules as the Applicants did not file a notice of motion application within 21 days after the leave to commence judicial proceedings was granted. The Notice of Motion Application dated May 20, 2022 was served on June 2, 2022.
73. It is the Respondents submission that the application was filed outside the prescribed timeline.
74. It is not in contest that Order 53 Rule 3(1) of Civil Procedure Rules is couched in mandatory terms and Judges have held that the timeline must be complied with as defined in *Black's Law Dictionary* as follows:-

' As used in statutes contracts, or the like this word is generally imperative or mandatory. In common ordinary parlance and in its ordinary significance, the term 'Shall' is a word of command and one which has always or which must be given a compulsory meaning: denoting obligation. It has a peremptory meaning and is generally imperative or mandatory.'

75. The court is also guided by the finding and holding in *Republic V Public Procurement Administrative Review Board and another; Mer Security and Communication System Ltd/Megason Electronics and Control 1978 (JV) and another (Interested Party); Ex-parte Magal Security Systems Ltd/Firefox Kenya Ltd (JV) (2019) eKLR* where the court held as follows;

' In view of my conclusions herein above, and my finding that section 9(3) of the *Law Reform Act* and Order 53 Rule 3 (1) of the Civil Procedure Rules, 2010 are couched in mandatory terms and, also my finding that Article 159 (2) (d) of the *Constitution* cannot be of help to the ex-parte applicant under the circumstance of this suit'



76. Puzzlingly, the ex-parte applicants have not made an application for extension of time to file the Judicial Review application.
77. For the above stated reasons, the court is in agreement with the Respondents and 7th Interested Party's submissions that there are no valid judicial proceedings before the court and the decision has been implemented to justify the prayer that leave should operate as a stay.
78. Consequently, the prayer that leave granted do operate as a stay is declined with no orders as to costs.
79. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 3RD DAY OF OCTOBER 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act* (**Chapter 21 of the Laws of Kenya**) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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