Kenya Karate Federation & 3 others v Sports Disputes Tribunal; Sports Registrar & another (Interested Parties) (Miscellaneous Application E204 of 2023) [2024] KEHC 3267 (KLR) (Judicial Review) (20 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3267 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION E204 OF 2023

JM CHIGITI, J

MARCH 20, 2024

BETWEEN

KENYA KARATE FEDERATION ..... 1ST APPLICANT

ENOS NGUNGU MUGUKU ..... 2ND APPLICANT

GABRIEL MUTUKU NDINGAI ..... 3RD APPLICANT

BUITHA MANWA MUSOMI ..... 4TH APPLICANT

AND

THE SPORTS DISPUTES TRIBUNAL ..... RESPONDENT

AND

SPORTS REGISTRAR ..... INTERESTED PARTY

JAMES MWANGI GIKONYO ..... INTERESTED PARTY

(IN THE MATTER OF: THE SPORTS DISPUTES TRIBUNAL CAUSE SDTSC NO. 003 OF 2023 ASCONSOLIDATED WITH SDTSC NO. 008 OF 2023)

RULING

1. The application that is before this court is the one dated the 18th December 2024 wherein the applicant seeks the following orders;

    1. Spent

    2. That leave be granted to the Applicants to apply to this Honorable Court for Orders/ declaration that the Respondent's Decisions/Orders/Directions by the tribunal's chairman,

Honorable John M. Ohaga SC, and issued on 28thNovember 2023 in SDTSC No. E003 of 2023 as consolidated with SDTSC No. E008 of 2023 is ultra vires the jurisdiction of the Tribunal, unlawful, illegal, unreasonable and openly biased.

3. That this Honorable Court do grant leave to the Applicant herein to apply to this court for orders of certiorari, to call, remove, deliver up to this HonorableCourt and quash the Respondent's Decisions/Orders/Directions by the tribunal issued on the 28th of November 2023 in SDTSC No. E003 of 2023 as consolidated with SDTSC No. E008 of 2023 directing the suspension of the 2nd to 4th Applicants herein as a National Federation interim officials from holding office and barring the 1st Applicant from accessing public funds.

4. That this Honorable Court do grant to leave to the Applicant herein to apply to this court for orders of prohibition to restrain the Respondent from purporting to enforce and/or execute the Decisions/Orders/Directions issued on the 28th November 2023, in SDTSC No. E003 of 2023 as consolidated with SDTSC No. 008 of 2023 in directing the interested party herein to form a caretaker committee.

5. That the grant of leave under prayers 2, 3, and 4 above does operate as a stay against implementation, execution and/or enforcement of the Respondents Decisions/Orders/ Directions and/or any consequential proceedings currently ongoing or arising out of the impugned decision of the 28th of November 2023 pending the hearing and determination of the substantive Application for Judicial review.

6. That this Honorable Court do grant any other or further relief that it may deem fit to grant including but not limited to exemption under Section 9 (4) of the *Fair Administrative Action Act* No. 4 of 2015.

The applicants' case;

2. On the 20th of June 2023 the Respondent made a decision in SDTSC No. E003 of 2023 as consolidated with SDTSC no. E008 of 2023.

3. It is the Applicant's case that on the 14th November 2023, the Applicant herein filed a Notice of Motion Application for Review of the Respondent's decision of the 20th of June 2023.

4. On the 28th of November 2023, the Respondent through its chairman the Honourable John M. Ohaga SC, urged the Applicant to canvass its notice of motion even though the Appellant/Respondent in SDTSC no. E003 of 2023 as consolidated with SDTSC no. E008 of 2023 – James Mwangi Gikonyo had not by then and did not eventually file a replying affidavit to the application.

5. They argue that on the 28th of November 2023, the Respondent issued a series/sequels and or editions of written and signed decisions/orders all bearing different panel members and with disparate/ contradictory orders.

6. On the 4th of December 2023, the Applicant's Advocates on record herein wrote to the 1st Respondent protesting the sense and meaning of all the different/contradictory rulings from the 1stRespondent.

7. On the 5th of December 2023 the Respondent through the chairman the Honorable John M. Ohaga S.C. wrote back describing the 2 first editions of the decisions as "incomplete drafts" of its decisions and that they should be disregarded.

8. It is their case that neither the Chairman nor the Tribunal gave a Certificate for Amendment/ Correction of the decisions as either "clerical errors or errors of accidental omissions" as envisioned by Rule 26 (3) of the Sports Disputes Tribunal Rules 2022.

9. Altering the nature of the orders/directions at the tail end of the decision cannot be viewed as justifiable nor a clerical error nor omission as it goes to the root of the decision itself and changes it dramatically and illegally.

10. They then filed a notice of appeal of the decision(s) of the Respondent on the 4th day of December 2023.

11. They are of the view that the impugned decisions/orders of the 1st Respondent seem to have been predetermined against the Applicant particularly the nature of orders issued are made with bias in favour of the 2nd Interested Party which is an illegal scheme, unlawful unreasonable.

12. The Respondent's impugned/orders have the effect of paralyzing and incapacitating the 1st Applicant as a national federation insofar as its suspension and blockage from benefiting or accessing public funds is concerned which will in turn negatively affect over 10,000 Karate stakeholders not just the Applicants since without public funding, which is almost 100% of the 1st Applicants source of funding for national and international sporting events, and cripple the yearly events schedule putting the stakeholders at risk of losing out in preparation for international championships.

13. They argue that the Respondent's impugned orders were made in excess of its jurisdiction.

14. The Respondent having disallowed the Applicants application cannot on its own motion amend, review, vacate and/or set aside its orders issued on the 20th June 2023 if the same were in any event issued lawfully.

15. The Respondent on the face of it, shows and displays heavy and deep interest in the fate of the 2nd to 4th Applicants status as interim officials of the 1st Applicant thus making it seriously conflicted.

16. In the further affidavit the applicants argue that contrary to paras 3and 4 of the 'Replying Affidavit' the decision made by the Respondent on the 14th November 2023, was totally an illegal, irrational and procedurally improper which conduct was against the dictates of the jurisdiction of the Tribunal under Section 59.

17. The 'Replying Affidavit' in para 3 erroneously cites Section 58 of the *Sports Act* no. 25 of 2013, claiming it talks to the issue of jurisdiction whereas it dictates the provisions on vacancy in the office of member of the Tribunal which goes to show the '2nd Interested Party' (I.P.) does not fully appreciate the workings and mandate of the Tribunal.

18. Paragraph 4 of the Affidavit is only affirming the provisions of Section 22 (1) f of the Sports Disputes Tribunals Rules which explains the duty to uphold the dignity of the Tribunal. A clear reading of paragraph 30 of the impugned decision no. 3, shows that the Tribunal was only dissatisfied that the,

> " ...the Applicant has not made substantial and satisfactory good faith efforts to comply with the orders..."

19. It is their case that in paragraphs 5 and 6 of the Replying Affidavit are wasted by the fact that all 3 copies of the impugned decision make reference only to our Application dated the 14th November 2023 as an application for review and enlargement of time.

20. At no time was the contempt of court application applied to this case in the impugned decisions hence the very fact of illegality, bias and unfair administrative action by virtue of the findings of suspension of the 2nd to 4thApplicants by the Respondent.

21. The Rules enumerated in paragraphs 9-11 of the Replying Affidavit while the same are truer in text, do not apply to the case under review sine there was no application before the Tribunal which in any event was functus officio and could not have appropriated itself to impose the sanctions provided under these state rules on an application for extension of time as unlawfully happened in this case.

22. They argue that paragraph 12-14 are totally unwarranted since they woefully and wrongly assume a party condemned has no rights that when violated and to which he can appeal to the High Court for protection and enforcement of these inalienable rights applies such as under this review, a party is to be condemned unheard. Such a situation cannot persist.

23. The Applicants have a right of appeal to such a decision and they cannot be said to be suspended hence the rights are mysteriously take away especially when a tribunal has made an erroneous decision that puts the Applicants to injury such as in this case.

24. The Respondents want to confuse the Decision under Review since they are refereeing to the 20th June 2023 decision. That was settled and the only part for review was the extension of time so in essence the 2nd I.P. has mixed up issues here and this cannot stand as justifiable cause.

25. The Caretaker committee to which again without any application before the Tribunal, if only by whim, it went ahead to illegally and without colour of right make the further unlawful edicts on 5th or 6th December 2023 directing the Sports Registrar to create by appointment a caretaker committee.

26. In challenging paragraphs 22-28 of the Replying Affidavit, the fact of altering the nature of the orders/ directions, which is acceded to (para 24) at the tail end of the decision even to a layman cannot be viewed as justifiable nor a clerical error nor omission as it goes to the root of the decision itself and changes it dramatically and illegally which is untenable a situation for the ends of justice to be evidently manifested.

27. In paragraph 24 further shows lack of truthfulness on the part of the 2nd I.P. since neither the Chairman nor the Tribunal gave a Certificate for Amendment/ Correction of the decisions as either "clerical errors or errors of accidental omissions" as envisioned by Rule 26 (3) of the Sports Disputes Tribunal Rules 2022 which is required by law and hence making the decisions in toto ultra vires the legal capacity granted to the Tribunal which was totally ignored and not proved at all.

28. They argue that the impugned decisions/orders of the 1st Respondent seem to have been predetermined against the Applicant particularly the nature of orders issued are made with Bias in favor of the 2nd Interested Party which is an illegal scheme, unlawful unreasonable.

29. The Respondent's impugned orders were made in excess of its jurisdiction and were not lawful at all as alleged in the Replying Affidavit.

30. Since the Replying Affidavit has its jurat hanging alone in a separate page with the text ending on another page that because of this glaring irregularity, the Replying Affidavit should be struck out from the record which in essence means that our application for leave is totally undefended since it was only the 2nd I.P. which field any documents albeit now subject of striking out by this Honorable Court.

The 2nd interested parties case;

31. It is the submission of the 2nd Interested Party that the averments made by the Applicants are not grounded in law nor in fact as expounded below:

32. Rule 22(5) and (6) of the Sports Dispute Tribunal Rules 2016 provides that the Tribunal shall make such order in relation to the application for review as it considers fit and further that no application shall be made to review a decision made under the reviewed matter.

33. From the above, no other Application can be made to review the decision already reviewed and with that, this Application should not be entertained and should be dismissed with costs at first instance.

34. It is the submission of the 2nd Interested Party that the Applicants are out of order by making this Application when it has been barred by law. Further, Applicants have neither proven nor substantiated why the Application should be heard.

35. The Applicants filed an Application for review dated 14th November 2023 in a bid to extend time for the interim officials to be in office which had already lapsed where the Tribunal gracefully granted leave for the same and the application was heard on 15th November 2023 in accordance with Rule 19(1) and (2) of the Sports Dispute Tribunal Rules 2016 where the chairperson explained to the parties the directions in which the proceedings would take and the Tribunal's proposal was accepted by all Counsels present. Including the Applicant's Advocate on record.

36. The Tribunal upon hearing all the parties and adhering to all the procedural rules issued a determination under Rule 22(5) of the Sports Dispute Tribunal Rules 2016 that makes provisions on application and proceedings of a review.

37. The Application was heard orally on 15th November 2023 with the Tribunal following the guidelines of Rule 19(1) and (2) of the Sports Dispute Tribunal Rules 2016 and requested the parties of converse the Application orally, to which they agreed and proceed as such and Counsel for the Applicant did not objected to the same and in the same breath the matter was under a certificate of urgency that needed to be dispensed with fast, the oral hearing was the fastest to expedite the hearing of the Application.

38. The oral submissions and issues raised in the alleged review were extensively conversed and the oral response clearly brought out the reasons as to why the 2nd Interested Party was objecting to the Application, to save the Court's time and resources there was no need to file any further documentation.

39. The Counsel for the 2nd Interested Party explained to the Tribunal that the failure to file a response to the Application was occasioned by the negligence of the Applicants to serve and file on time and by time constraints having been served in the morning of the Tribunal's sitting to hear the Application. This further compounds the fact that the Applicants are without good intentions in filing this suit and the laxity they have shown in following Court orders and advancing the objectives of the 1st Applicant.

40. In conclusion to this issue, the ruling considered material facts as presented by the parties and the dismissal of the Application for review was not on the fault of the Tribunal but of the Applicants for not meeting the standard set for a review as extensively discussed and analyzed by the Tribunal in its ruling.

41. At the time of filing this Application and pursuant to Rule 23(3) Sports Dispute Tribunal Rules 2016 and the Orders of this Honorable Court dated 19th December 2023 where no stay orders were granted, Gabriel Mutuku Ndingai and all interim officials were suspended officials of the 1st Applicant based on

the ruling of the Tribunal dated 28th November 2023. On that basis, his Affidavit dated 18th December 2023 should be disregarded and struck off the record.

42. In the case of Law Society of Kenya vs Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000 the following is stated:

> " Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in a Court of Law". Further in the case of Alfred Njau and Others -Vs- City Council of Nairobi [1982] KAR 229 the Court also held that: "the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".

43. Further, Order 4 Rule 4 of the Civil Procedure Rules dictates that; "Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so." By implication, the Kenya Karate Federation having been established and registered under the *Sports Act* No. 25 of 2013 and a certificate of registration issued to that effect, it is an independent artificial person.

44. Therefore, only authorized persons can swear affidavits on behalf of the Federation, since Gabriel Mutuku Ndingai stands suspended he cannot purport to continue to act in the capacity of the secretary and more so swear it on behalf of the other suspended interim officials.

45. Additionally, the 2nd to 4th Applicants stand suspended as such they have no business being before this Honorable Court since they are strangers to the 1st Applicant and continue to defy the orders of the Respondent which have not been stayed or vacated. The 2nd to 4th Applicants lack locus standi to adduce any evidence before this Court.

46. Without prejudice to the statements made above the 2nd Interested Party states as follows:

> " Kenya Human Rights Commission v Attorney General & Law Society of Kenya [2018] eKLR Justice Mwita opined that 'punishing through contempt of court is the means by which courts sanction non-compliance with its orders, judgments and decrees, and a court of justice without power to vindicate its own dignity, to enforce obedience to its mandates, to protect its officers, or to shield those who are entrusted to its care, would be an anomaly which could not be permitted to exist in any civilized community. Without such protection, courts of justice would soon lose their hold upon the public respect, and the maintenance of law and order would be rendered impossible."

47. Additionally, Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR spells out the elements of contempt to include: 'The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant, the defendant had knowledge of or proper notice of the terms of the order, the defendant has acted in breach of the terms of the order, and the defendant's conduct was deliberate.'

48. From the foregoing it is clear that the Applicants were aware of the clear and unambiguous orders passed on 20th June 2023. The Applicants did not object to the legality of the same as seen by the fact that they never exercised their right to appeal and even sought more time to ensure compliance. The orders were read in open court and hence the proper notice was issued and due to their binding nature, they ought to have been obeyed.

49. Furthermore, the Applicants blatantly disregarded the court orders because, by their admission under paragraph 7 of their Chamber Summons dated 18th December 2023, they allege that the tribunal has

no other role after passing its judgement. Reasonably, this cannot be the case. They were deliberate in their actions as they purported to make the illegal application for review after the 120 days granted in the 20th June 2023 judgement had lapsed and the application for contempt of court dated 28th August 2023 had been filed and heard.

50. Court orders cannot be taken for granted. The objectives of the *Sports Act* No. 25 of 2013 are to harness sports for development and to provide for the establishment of sports institutions, facilities, administration and management of sports in the country, and connected purposes and clearly, it was not the intention of the Act to make the only body authorized to protect the provisions of the Act powerless and in that the Respondent has to and must have a way to see that its orders are enforced and obeyed.

51. The Respondent acted within its jurisdiction as provided under Section 58 of the *Sports Act* No. 25 of 2013 and the authority granted under Section 64 of the same Act in relation to any violations of the *Sports Act* No. 25 of 2013. Contempt being one of the violations.

52. In Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi) [2018] eKLR, the Court made the following observations;

> "It must however be remembered that Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying therewith, the honorable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1KLR 828, Ibrahim, J (as he then was) stated:
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> > "It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void".

53. Tribunals are categorized as Courts under Article 169(d) of *the Constitution* 2010. It is fair to say the above precedent on contempt apply to the Sports Dispute Tribunal as established under the *Sports Act* No. 25 of 2013.

54. Further, Rule 22(1)(f) of the Sports Dispute Tribunal Rules 2016 provides for how the Tribunal can uphold its dignity. Protecting its orders and reputation falling squarely within this realm.

55. In conclusion, the 2nd Interested Party argued that the Respondent had the power and authority to deal with the matter as it deemed fit and appropriate once it was clear that the Applicants were not ready to obey its orders. Therefore, the allegations of the Applicants that the tribunal is powerless after it issues judgment are baseless and not anchored in law as shown above.

56. The Respondent derives its powers from Section 58 of the *Sports Act* No. 25 of 2013 and the Sports Dispute Tribunal Rules 2016. Rule 23(7)(e) of the Sports Dispute Tribunal Rules 2016 avers that the Tribunal may impose other penalties as it considers commensurate with the offence. Hence, the Tribunal is empowered by the law to suspend the interim officials and to avoid a lacuna and in the best interest of the Sport the Tribunal deemed it fit that a caretaker committee should see the 1stApplicant through the 1st elections.

57. Rule 23(7)(b) of the Sports Dispute Tribunal Rules 2016 states that the Tribunal may suspend a person from activities of the National Sports Organization, and further Rule 23(7)(e) provides that it may impose other penalties as the Tribunal considers commensurate with the offence, and in Rule 23 (7) (f) further provides for a combination of any of the above penalties as the Tribunal thinks fit. From the foregoing provisions, the Tribunal has lawful powers to suspend the interim officials as it deems fit and in this case it lawfully did.

58. Under Rule 23(5) of the Sports Dispute Tribunal Rules 2016 the Tribunal may also make recommendations to the Ministry of Sports, the National Sports Organization and/or the Registrar to suspend or withdraw funding or services made available to a party if it believes they are in disobedience of the Tribunals orders to ensure full compliance. Therefore, the Tribunal has the power to direct that the 1st Applicant shall not benefit from any public funds for non-compliance with its lawful orders.

59. In regards to the caretaker committee, the directions were for the Registrar to take such necessary steps to name and identify the individuals who shall constitute the committee as the appointment of the said committee is the mandate of the Cabinet Secretary asper section 54 of the *Sports Act* 2013 and in compliance with the said orders the Registrar wrote to the Cabinet Secretary on 7th December 2023 a letter requesting the appointment of the caretaker committee. Contrary to the allegations of the Applicants under Paragraph 11 of the Chamber Summons dated 18th December 2023.

60. Accordingly, it is his case that he who comes to equity must come with clean hands which the Applicants seem to think that they are exempt from and one cannot derive an advantage from his own wrongdoing as opined in Gabriel Mbui vs Mukunda Muraya (1993) KLR. The Applicants claim that the Tribunal has done wrong by them but the truth is the orders issued on the 28th November 2023 were justified and reasonable considering the contempt shown both in procedures of the Tribunal and compliance of its orders.

61. To illustrate the good faith of the Respondents, the 2nd to 4th Applicants were on the 20th of June 2023 declared as interim officials who were to ensure compliance with the Tribunal decision. However, they did not see that through, so their term in office ended on 17th October 2023 after the 120-day lapse as per order 5 of the judgment dated 20th June 2023 and on 28th November 2023 the ruling was an exercise of its authority to enforce its orders which the Applicants are now condemning stating foul play.

62. The 2nd Interested Party admits that jurisdiction is everything as was established in the locus classicus Owners of the Motor Vessel "Lilian' vs. Caltex Oil (Kenya) Ltd (1989) KLR and as proven the Respondent had and has the jurisdiction to issue the orders it did. In conclusion, the orders issued by the Respondent were justified, rational, and reasonable

63. The Applicants aver that there were three separate and contradictory decisions, which is a total misrepresentation of facts considering that the Counsel for the Applicants was in Court on 28th November 2023 when the ruling was delivered by the Chairman of the Tribunal.

64. The orders issued on 28th November 2023 were compliant with Rule 23(2) of the Sports Dispute Tribunal Rules 2016 that provide for the elements of a valid decision and with that the Applicants are misleading this Court by stating that the orders were separate and contradictory as they were from the same Tribunal where all Counsels were present.

65. The first orders did not reflect what was read by the Tribunal on the 28th of November 2023, the second one did not have the requisite signatures. The third and last copy sent out met the requirements of Rule 23(2) of the Sport Dispute Tribunal Rules 2016 and it was the true copy of what was read in open Court.

66. All these were irregularities foreseen and addressed under Rule 26(3) of the Sports Dispute Tribunal Rules 2016 which provides that the Tribunal may correct clerical mistakes or errors in any document, recording, direction, order or decision of the Tribunal, arising from an accidental omission, by a certificate issued by the chairperson.

67. The Chairman of the Tribunal issued an explanation of the same via an email dated 5th December 2023 and as conceded by the Applicants where he clarified that the last orders were as delivered in Court. This communication is clear, concise, and direct to explain the clerical errors therein.

68. Additionally, the last orders were verbatim and seriatim of the orders read in open Court on 28th November 2023 contrary to the allegations of the Applicants the orders were not altered and to state otherwise is misleading the court and the court should not entertain perjury by the Applicants.

69. It is quite malicious that the Applicants purport to take the original drafts of the orders as the true orders despite being present and being aware of the delivery made orally in Court on 28th November 2023 which proves malice aforethought and bad faith on the side of the Applicants.

70. Due to the reasons laid out above the 2nd Interested Party submits that the prayers sought by the Applicants are unreasonable and unjustified. They have not proved nor adduced a shred of evidence regarding the issues raised in their Application dated 18th December 2023.

71. The orders sought are unreasonable and malicious. Should they be granted the office of the Respondent will be open to ridicule at the expense of all the Sports Organizations that rely on it. Therefore, this Application should be dismissed with costs in favour of the 2nd Interested Party for failing to meet the threshold of proof in civil matters such as this, balance of probability.

72. Accordingly, the 2nd Interested Party submits that it is in the best interest of justice that this Application thereto fails due to lack of merit and be dismissed with costs. Further, as stated in Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated) [2023] KESC 40 (KLR) (16 June 2023) a court should only interfere with the powers granted to public body unless constitutional and statutory provisions were not adhered to or if the actions were illegal and unlawful. The Applicants have not proven any such violations nor any legal or procedural illegalities.

73. The 2nd Interested Party submits that the Replying Affidavit dated 27th December 2023 is valid and admissible before this Honorable Court. It was stated in GACHUI AKOTHAERENGERUA v ZENA SALIM AHMED (Suing as the administratrix of the estate of SALIM AHEMED SALEM[2012] eKLR stated that "In support he quoted Order 18 Rule7 of the Civil Procedure Rules which states; "The Court may receive any affidavit sworn for purpose of being used in any suit notwithstanding any defect by mis-description of the parties or otherwise in the title or other irregularity in form thereof or on any technicality" The Court noted that whereas it is good practice for the jurat of the affidavit to be in the same page of the oath it is not expressly required to be so by the Oath and Statutory Declarations Act (CAP 15) Laws of Kenya.

74. Having considered the rival submissions on the issue, it is his case that although the jurat of the affidavit is on a separate page the same is not fatally defective and the court has discretion to admit it as long as the defect is of form and not the substance as provided by Order 18 Rule 7 of the Civil Procedure Rules.

75. Additionally, Mungania Tea Factory Company Ltd & 50 others v Attorney General [2021] eKLR the following was stated;

> " as clearly stated under Article 159(2) (d) of *the Constitution* of Kenya 2010 that the courts in dispensing justice should not pay undue regard to procedural technicality. In my view and just as Gikonyo J observed in Burnaby Properties Limited –vs Suntra Stocks Limited [2015] eKLR, Article 159(2) (d) of *the Constitution* expressly depreciates such technicalities in favor of substantive justice. It is my considered view that the supporting affidavit by the applicants herein is proper for all purposes and intents as the defects in the jurat being on a separate page with the rest of the affidavit are curable under article 159 of *the constitution*."

76. Section 5 of the Oaths and Declaration Act Cap. 15 Laws of Kenya as read together with section 72 of the *Interpretation and General Provisions Act* Cap. 2 Laws of Kenya do not provide for the place a jurat should be and further that no affidavit should be struck out on such a technicality.

Analysis and determination:

77. I have considered the Application and I find the issue for determination is: Whether the Application for leave is merited.

78. The requirement to seek for leave to file for judicial review orders is provided for under Order 53 Rule 1 of the Civil Procedure Rules which stipulates under mandatory terms that no Application for an order of Certiorari, Mandamus or Prohibition shall be made unless leave therefore has been granted in accordance with the rule.

79. In IRC V National Federation of Self-Employed and Small Businesses Ltd (1982) 617, (1981) 2 ALL ER 93 Lord Diplock explained the need for leave as follows:

> " Its purpose is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."

80. It would therefore appear that the reasons for leave are therefore two-fold and that is number one to save the court's time and, two, so as not to leave public authorities in a state of uncertainty as to whether they can safely proceed with their operations.

81. In the same case, Lord Scarman saw the need for leave as 'an essential protection against abuse of legal process'. In his words, "it enables the court to prevent abuse by busybodies, cranks and other mischief makers".

On his part, Woolf LJ referred to the need for leave, in the same case, as 'the unique statutory means by which the court can protect itself against abuse of judicial review'.

82. In order to avoid from delving into the merits of the case, Lord Diplock, in IRC V National Federation of Self-Employed and Small Businesses Ltd (supra) suggested the following approach:

> " If, on a quick perusal of the material then available, the court thinks the Application discloses what might on further consideration turn out to be an arguable case in favor of

granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief."

83. Thus, on this basis, the applicant only has to show not that it is, but that it might turn out to be, an arguable case.

84. The question of whether a case is arguable or not may occasionally require some questioning on the case's merits, but this type of questioning won't go far enough to determine whether the case will win or fail. The questioning will be severely constrained or limited, only going as far as is required to decide whether the matter can be argued, and nothing beyond. It is from this perspective that I will consider the applicant's Application.

85. On a quick perusal of the material available, the court thinks the Application discloses what might on further consideration turn out to be an arguable case in favor of granting to the applicant the leave sought.

86. In light of the evidence adduced, and upon a cursory perusal of the evidence before court and without delving into the arguments by the ex-parte applicants, it is my view that the case is sufficiently meritorious to justify leave. It cannot be said to be frivolous or vexatious.

87. On the question of whether the said leave should operate as a stay of the impugned actions by the respondent's and decision to levy fee on the ex parte applicants, 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."

88. In R (H). v 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 main consideration is always whether or not the decision or action sought to be stayed has been fully implemented. In Taib A. Taib v The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006 the court held that: -

> " ... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act...."

89. It is therefore clear 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. The applicants have not made out a case for the grant of a stay order.

Disposition:

90. The Applicant has made out a prima facie case as a result of which leave to institute Judicial Review proceedings do issue, and I so hold.

Order:

1. The Application 18th December 2024 is allowed in the following terms.
2. Leave is hereby granted as prayed
3. The Substantive Motion shall be filed and served within seven (7) days of today's date.
4. The Respondent and the interested parties shall file and serve their responses within fourteen (14) days of the date of service of the Applicant's Motion.
5. The Applicant shall thereafter file and serve its submissions within 14 days of the date of service.
6. The Respondent and the interested parties shall file and serve their submissions within fourteen (14) days thereafter.
7. The matter shall be mentioned on 15th July, 2024 with the view to securing a judgment date.

It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 20TH DAY OF MARCH, 2024.

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J. CHIGITI (SC)

JUDGE