



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. E074 OF 2020

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DISCIPLINARY TRIBUNAL OF THE LAW SOCIETY OF KENYA.....RESPONDENT

AND

PATRICK MWEU MUSIMBA.....INTERESTED PARTY

EX PARTE:JOHN WACIRA WAMBUGU

RULING NO 2

1. The *ex parte* Applicant herein, John Wacira Wambugu, is an advocate of the High Court of Kenya, filed an application by way of a Chamber Summons dated 10th December 2020 seeking the following orders:-

- a) **THAT the application be certified as urgent and service thereof be dispensed with in the first instance.**
- b) **THAT leave be granted to the Applicant to apply for orders of Certiorari to quash the decision of the Law Society of Kenya Disciplinary Tribunal in Cause No. 160 of 2020 involving the ex-parte Applicant, JOHN WACIRA WAMBUGU, the order issued on 12th October, 2020 requiring the Applicant to deposit the undisputed sum of Ksh. 11,279, 287/= and release the same to the Law Society of Kenya.**
- c) **THAT the grant of leave do operate as a stay of the direction of the Respondent herein directing the Applicant to deposit the sum of Kshs. 11,279,287/ = with the Respondent.**
- d) **THAT cost of this suit be provided for.**

2. The said application is supported by a statutory statement dated 10th December 2020, the *ex parte* Applicant's verifying affidavit sworn on the same date. This Court in a ruling delivered on 16th December 2020 as corrected on 24th December 2020, granted the *ex parte* Applicant leave to commence judicial review proceedings, and directed that prayer 3 of the Chamber Summons application that the said leave operates as a stay be canvasses *inter partes* by way of written submissions. This was after the Court considered the applicable principles on leave operating as stay, and noted that given the time that has lapsed between the date the said orders were granted on 12th October 2020, and the time of filing of the instant application, this Court needs to confirm what the *status quo* is from the other parties herein before granting any further orders.

3. The firm of Wacira Wambugu & Co. Advocates who are on record for the *ex parte* Applicant has since filed a substantive Notice of Motion dated 22nd December 2020, and filed submission dated 4th January 2021 on the said prayer 3. It was submitted therein that that the *ex parte* Applicant is yet to deposit the said sums, thus the decision of the Respondent is yet to be fully implemented and the same is capable of being implemented. Further, that the judicial proceedings herein may be rendered nugatory if stay is not granted, rendering the same an academic exercise, and reliance was placed on the decision in **Taib A. Taib vs The Minister for Local Government & Others, Mombasa HCMISCA. No. 158 of 2006.**

4. Lastly, that there exists an advocate client relationship between the *ex parte* Applicant and the Interested Party, the *ex parte* Applicant is entitled to fees, and the decision in **Booth Extrusions (Formerly) Booth Manufacturing Africa Limited vs Dumbeya Nelson Muturi Harun t/a Nelson Harun & Company Advocates [2014] eKLR** that there is a general lien which confers upon advocates the right to retain all the client's papers, money or other chattels which came into possession until all the costs and charges due to the advocates are paid was cited.

5. The *ex parte* Applicant therefore submitted that the direction by the Respondent to deposit the said sums of money will deny him his right of lien to secure his outstanding legal fee, and that he is likely to suffer grave prejudice and irreparable damage should the said amounts be released to the Interested Party by the Respondent and also lose his right of lien over the said sums.

6. The Interested Party subsequently filed a replying affidavit he swore on 26th January 2021, and his advocates on record, Andrew & Steve Advocates, filed submissions dated 27th January 2021. The Interested Party's case is that the *ex parte* Applicant cannot continue to hold the funds as there exists a conflict of interest between them due to the fiduciary duty owed by the *ex parte* Applicant to the Interested Party, and that the funds should be held by a third party who has no interest over the funds pending the hearing and determination of the issue of costs and the complaint. The Interested Party relied on the definition of conflict of interest as stated in the decision in **Serve in Love Africa (Sila) Trust v David Kispang Kipyego & 7 Others, [2017] eKLR**.

7. Therefore, that the Intervention of the Respondent was anchored on sound principles of law, and staying the order of the Respondent only goes to allow the Applicant to have discretion or control over funds that he could utilize for his own selfish interest.

The Determination

8. I have considered the arguments by the parties, and I am guided by the exposition on the purpose of a stay in **R (H.) vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, where it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision, and in various decisions by Kenyan Courts.

9. It has in this regard been held 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. If it is a continuing nature, then it is still possible to suspend the implementation. See in this regard the decisions in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006**, **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995**, **Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR** and **James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR**.

10. In the present application, it is not contested that the *ex parte* Applicant has not implemented the orders of the Respondent to deposit the sums with it, and since the said deposit is the subject of the instant judicial proceedings, I am of the view that if the stay is not granted, it may render the *ex parte* Applicant's application nugatory if successful.

11. However, I also am mindful of the prejudice the Interested Party may suffer in the event that he is also successful in his complaint before the Respondent and the said sums are depleted by the *ex parte* Applicant. Therefore, any stay must be on conditions that preserve the subject matter of the dispute between the parties, and in which case none of the parties will be prejudiced thereby.

The Disposition

12. In the premises, I hereby make the following orders:

I. The leave granted herein on 16th December 2020 to commence judicial review proceedings shall operate as a stay of the direction of the Respondent herein directing the Applicant to deposit the sum of Kshs. 11,279,287/= with the Respondent, pending the hearing and determination of the *ex parte* Applicant's substantive Notice of Motion, only on condition that the *ex parte* Applicant deposits the said sum of Kshs. 11,279,287/= in Court within twenty-one (21) days of the date of this ruling, and upon default the stay orders herein will automatically lapse.

II. The Respondent is granted leave to file and serve its response to the *ex parte* Applicant's substantive Notice of Motion dated 22nd December 2020 within fourteen (14) days of today's date.

III. The *ex parte* Applicant shall file and serve the Respondent and Interested Parties with submissions on the substantive Notice of Motion dated 22nd December 2020 within twenty-one (21) days of service, or upon default thereof.

IV. The Respondent and Interested Parties are granted leave to file and serve their reply submissions to the *ex parte* Applicant's substantive Notice of Motion dated 22nd December 2020 within twenty-one (21) days of service by the *ex parte* Applicant.

V. The *ex parte* Applicant's Notice of Motion dated 22nd December 2020 shall be heard by email on 16th June 2021.

VI. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19

pandemic, this Court shall hear and determine the *ex parte* Applicant's Notice of Motion dated 22nd December 2020 on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

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

VIII. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

IX. The parties shall also be required to file their respective affidavits evidencing service in the Judiciary's e-filing system.

X. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 16th June 2021, and shall send a copy of this ruling to the *ex parte* Applicant, Respondent and Interested Party by electronic mail by close of business on 14th April 2021.

XI. Parties shall be at liberty to apply.

13. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF APRIL 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING

Pursuant to the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from Risks Associated with the Global Corona Virus Pandemic dated 17th March 2020 and published 17th April 2020 in Kenya Gazette Notice No. 3137 by the Honourable Chief Justice, this ruling was delivered electronically by transmission to the email addresses of the *ex parte* Applicant's, Respondent's and Interested Parties' Advocates on record.

P. NYAMWEYA

JUDGE