

## HCJR/E060/2021

### RULING

#### **The Application**

1. The ex parte Applicants herein are Kenyan citizens, and they have filed an application by way of a Chamber Summons dated 5th May 2021, seeking the following orders:

- 1. The matter be certified as urgent;**
- 2. The Notice to the Registrar be dispensed with in the first instant;**
- 3. The Court be pleased to grant leave to the ex-parte applicants to apply for Judicial Review to prohibit the 1st Respondent from summoning the Chief Executive Officers of the 47 County Government Executive to appear before it as from 3rd May 2021;**
- 4. The Court be pleased to grant leave to the ex-parte applicants apply for Judicial Review to compel the 49th - 95th Respondents to execute their Constitutional and statutory duties of reviewing and making recommendations on the Auditor General's reports on financial statements.**
- 5. The grant of leave to operate as a stay of the 1st Respondent to Summon the Chief Executive Officers of the 47 County Executive to appear before it as from 4th May 2021 to 22nd September 2021;**
- 6. The costs of this application.**

2. The grounds for the application are stated in the ex parte Applicants' statutory statement dated 5th May 2021, and an affidavit sworn on the same date by the 1st ex parte Applicant. I however note that the relief sought in the chamber summons application differs from the relief sought in the statutory statement. I am in this regard bound by the orders sought in the application.

3. In summary, the ex parte Applicants averred that the Senate of the Republic of Kenya through the Clerk has by a notice published in the Standard Newspaper of 23rd April 2021 issued a Notice to Appear before the County Public Accounts and Investment Committee of the Senate in the months of May, June, July, August and September directed to the Chief Executive Officers of the 47 County Executive to appear before the said Committee, but does not have the requisite Constitutional authority as envisaged in Article 2(2) and 226(2) of the Constitution. Further, that the Chief Executive Officers of the County Executive who are also the accounting officers and by virtue of Article 226(2) are accountable to the County Assemblies, which have abdicated their roles as mandated by the Constitution

4. The ex parte Applicants annexed copies of the notice published in the Standard Newspaper of 23rd April 2021 by the 1st Respondent, and of reports by the 1st Respondent's County Public Accounts and Investments Committee.

#### **The Determination**

5. I have considered the application dated 5th May 2021 and the reasons offered in support of the urgency, and I am satisfied that the ex parte Applicants have demonstrated that this matter is urgent. This for reasons that the impugned actions by the 1st Respondent have commenced.

6. On the orders sought by the ex parte Applicants for leave to commence judicial review proceedings, the applicable law is Order 53 Rule 1 of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the leave as explained by Waki J. (as he then was), in *Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others*, Mombasa HCMCA No. 384 of 1996, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

7. It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in this respect in *Sharma vs Brown Antoine* (2007) 1 WLR 780, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

8. In the present application, the ex parte Applicants have provided evidence of the summons issued by the 1st Respondent, and have averred as to the grounds and reasons why it considers the 1st Respondent's decision to be illegal. To this extent I find that the ex parte Applicant has met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondents.

9. On the question of whether the said leave can operate as a stay of the summons, 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.”

10. 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, and to ensure that a party who is eventually successful in his or her challenge is not denied the full benefit of the success.

11. 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. It has in this regard been held that were 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.

12. These positions were also explained in 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.

13. In the present application, while the summons are amenable to stay as their implementation is on-going, it is not evident what prejudice will be suffered by the ex parte Applicants to justify a stay, and given that the unconstitutionality of the 1st Respondent's actions is yet to be established. The stay orders are therefore not merited for these reasons.

### **The Disposition**

14. In light of the foregoing observations and findings, the ex parte Applicants' Chamber Summons dated 5th May 2021 is found to be merited to the extent of the following orders:

- I. The ex parte Applicants' Chamber Summons application dated 5th May 2021 is hereby certified as urgent, and is hereby admitted for hearing ex parte in the first instance.**
- II. The ex parte Applicants are granted leave to apply for an order of Prohibition to prohibit the 1st Respondent from summoning the Chief Executive Officers of the 47 County Government Executive to appear before it as from 3rd May 2021.**
- III. The ex parte Applicants are granted leave to apply for an order of Mandamus to compel the 49th - 95th Respondents to execute their Constitutional and statutory duties of reviewing and making recommendations on the Auditor General's reports on financial statements.**
- IV. The prayer that the grant of leave to operate as a stay of the 1st Respondent to Summon the Chief Executive Officers of the 47 County Executive to appear before it as from 4th May 2021 to 22nd September 2021 is declined.**
- V. The costs of the ex parte Applicants' Chamber Summons application dated 5th May 2021 shall be in the cause.**
- VI. The ex parte Applicants shall file and serve the Respondents and Interested Parties with (i) the substantive Notice of Motion and submissions thereon, (ii) the Chamber Summons dated 5th May 2021 and its supporting documents, (iii) a copy of this ruling, and (v) a hearing notice, within fourteen (14) days from today's date.**
- VII. Upon being served with the said pleadings and documents, the Respondents and Interested Parties shall be required to file their responses, which shall include their substantive responses and any preliminary objections to the substantive Notice of Motion, together with their reply submissions, within fourteen (14) days from the date of service.**
- VIII. The ex parte Applicants are granted leave to file and serve a further affidavit and supplementary submissions if need be, which shall be strictly limited to any new facts and issues of law raised by the Respondents and Interested Parties, within seven (7) days of service by the Respondents and Interested Parties.**
- IX. Timelines shall be strictly observed in light of the on-going impugned actions by the 1st Respondent, and any default by any of the parties shall attract the appropriate**

sanctions and orders by the Court.

X. A virtual hearing of the ex parte Applicant's substantive Notice of Motion shall be held on 16th June 2021 at 3.00pm.

XI. 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 substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

XII. 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](mailto:judicialreview48@gmail.com) and [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XIII. 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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

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

XV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for a virtual hearing on 16th June 2021 at 3.00pm and shall send the parties an electronic link for the mention.

XVI. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the ex parte Applicant by electronic mail by close of business on Monday, 10th May 2021.

XVII. Parties shall be at liberty to apply.

15. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF MAY 2021**

**P. NYAMWEYA  
JUDGE**