



**Republic v Director of Criminal Investigations & 2 others; Ramji & 2 others  
 (Exparte); Mombasa Cement Limited (Interested Party) (Judicial Review  
 Application E010 of 2024) [2024] KEHC 10670 (KLR) (16 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10670 (KLR)

**REPUBLIC OF KENYA  
 IN THE HIGH COURT AT KIAMBU  
 JUDICIAL REVIEW APPLICATION E010 OF 2024  
 DO CHEPKWONY, J  
 AUGUST 16, 2024**

**IN THE MATTER OF: APPLICATION FOR ORDERS OF CERTIORARI & PROHIBITION  
 IN THE MATTER OF: THREATENED ARREST, DETENTION &  
 INTENDED PROSECUTION OF THE EXPARTE APPLICANTS.  
 IN THE MATTER OF: ARTICLES 22,23(F), 47 OF THE CONSTITUTION,  
 2010, THE LAW REFORM ACT, CAP 26 LAWS OF KENYA &  
 THE CIVIL PROCEDURE ACT, CAP 21 LAWS OF KENYA.**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**BHARAT RAMJI ..... EXPARTE**

**HARISH RAMJI ..... EXPARTE**

**ASHVIN RAMJI ..... EXPARTE**

**AND**

**MOMBASA CEMENT LIMITED ..... INTERESTED PARTY**



## RULING

1. On 14th August 2024, the respective counsels for the parties appeared before this court for directions regarding a Notice of Motion application dated 30th July, 2024, filed by the Ex-parte Applicants. The application primarily seeks a stay of proceedings in Milimani Magistrates Court Criminal Case No. E568 of 2024, pending the determination of an appeal against the ruling of this court dated 22nd July, 2024 and delivered on 24th July 2024.
2. It will be noted when the application was first presented to the court, interim orders were issued staying the proceedings before the magistrate's court pending the inter-partes hearing of the application. However, the court was informed that the Office of the Director of Public Prosecutions had filed another application dated 6th August, 2024, seeking to set aside the ex-parte interim orders issued by this court on 24<sup>th</sup> July, 2024. The grounds for this request included the assertion that the court had issued the orders without jurisdiction, as it is now functus officio in the matter.
3. Ms. Lumallas Eunice, Counsel appearing alongside Mr. Nanyuki for the Ex-parte Applicants, requested for leave of 21 days to file a response to the application filed by the ODPP and to be able to consider the responses to the Ex-parte Applicants' application. She urged the court to decline the request to set aside the ex-parte orders for stay, arguing that the Ex-parte Applicants also have constitutional rights that would be infringed if the orders were vacated before they are heard.
4. Mr. Sanjeev Khagram, counsel for the Interested Parties, and Mr. Gacharia, the state counsel, strongly opposed the Ex-parte Applicants' request for 21 days to file a response, arguing that such a period would be excessively long. They reiterated that the court became functus officio after delivering its final decision and therefore lacked jurisdiction to issue any further orders. On this basis, they urged the court to set aside or vacate the ex-parte orders. They further argued that the Ex-parte Applicants' application was an abuse of the court process, given that they had filed a similar application before the Court of Appeal, which had already issued directions on the matter.

### Analysis and Direction

5. Having carefully listened to the arguments and sentiments of all counsels herein with regard to the applications that have been filed by the Exparte applicants and the Respondents, I find the main issue for determination being whether or not to grant the orders either seek and if not, which directions can issue herein.
6. Based on the views of the counsel above, on Exparte orders issued herein, this court wishes to point out that ex-parte orders, by their very nature, are provisional and not conclusive. The law permits a court to grant such orders in the absence of the opposing party when the circumstances demand immediate intervention to preserve the status quo or prevent irreparable harm from happening. However, it is worth appreciating that these orders are always subject to review and can be maintained/upheld or set aside upon hearing both parties. This principle is grounded in the rules of natural justice, which dictates that no person should be condemned unheard.
7. The court's power to set aside ex-parte orders is well established under Order 40 Rule 7 of the Civil Procedure Rules, 2010, which allows the court to discharge, vary, or set aside an order of injunction upon application by any party dissatisfied with the order. Similarly, under Order 51 Rule 15 of the Civil Procedure Rules, 2010, the court has the discretion to set aside any ex-parte order on sufficient grounds being shown by the opposing party.



8. In the case of *Shah v Mbogo & Another* [1967] EA 116, the court held that the discretion to set aside ex-parte orders should be exercised in such a manner as to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error. However, this discretion should not be exercised in a manner that would prejudice the other party.
9. In the present case, the ODPP has challenged the interim orders on the ground that this court lacks jurisdiction claiming that the court became functus officio after delivering its decision in this matter on 24th July, 2024.
10. The court acknowledges the arguments put forth by the ODPP regarding the doctrine functus officio. However, it is equally important to consider that the ex-parte orders issued were interim in nature and were intended to preserve the status quo pending the hearing of the application inter partes. The issuance of these orders does not conclude the matter but rather provides a temporary relief to ensure that the Ex-parte Applicants' appeal is not rendered nugatory.
11. In the case of *Stanbic Bank Kenya Ltd v Kenya Revenue Authority* [2009] eKLR, the Court of Appeal emphasized that ex-parte orders are granted to preserve the subject matter pending the hearing of the main application. However, they can be set aside if sufficient grounds are shown.
12. In this instant case, the court is required to strike a balance between protecting the rights of the Ex-parte Applicants and ensuring that the ODPP's concerns about jurisdiction and potential abuse of court process are addressed.
13. It is also a well-established principle that justice must not only be done but must also be seen to be done. This principle demands that both parties be given a fair opportunity to present their cases. Therefore, while the court must be cautious not to overstep its jurisdiction, it must also ensure that the rights of all parties are protected and that no party is prejudiced by procedural technicalities as dictated by our constitution, 2010 at Article 158 (2) (a). Having carefully considered the respective submissions by all counsels for the parties herein, this court finds that no compelling reasons have been presented by either at this stage to warrant the immediate setting aside of the ex-parte interim orders that were issued herein on 30<sup>th</sup> July, 2024. The request to set aside the orders is based on arguments that require hearing of all parties and a thorough examination of the facts and the law, which cannot be conclusively be determined without hearing the parties substantively.

However, the court is also mindful of the need to expedite the proceedings and ensure that justice is not delayed. To this end, the court directs that:-

- a. The two applications dated 30th July 2024 and 6th August 2024 be heard contemporaneously by way of written submissions.
- b. To dispose of the same, the parties are hereby directed to file and serve their responses to the applications alongside their written submissions within 7 days from the date hereof. (In view of the issues involved, the respectful submissions to be limited to 5 pages each).
- c. Mention on 30th August 2024 before the Deputy Registrar for parties to confirm compliance with these directions and file sent to me for the ruling date on the applications to be set.
- d. The interim orders issued on 30th July, 2024 will remain in force until further orders of this court.

It is so ordered.

**RULING DATED AND SIGNED AT KIAMBU THIS 16th DAY OF AUGUST, 2024.**



**D.O. CHEPKWONY**

**JUDGE**

In the presence of;

Martin - Court Assistant

Mr. Nyanyuki Counsel for Ex-parte applicant

Mr. Sanjeer Khagram appearing alongside M/s Rukanga and Mr. Ongeru for the Interested party.

