



**Republic v Director of Public Prosecutions & 2 others; Dimo
 (Exparte Applicant) (Miscellaneous Application E021 of 2024)
 [2024] KEHC 14755 (KLR) (Judicial Review) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 14755 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
 JUDICIAL REVIEW
 MISCELLANEOUS APPLICATION E021 OF 2024
 JM CHIGITI, J
 OCTOBER 31, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 2ND RESPONDENT

THE CHIEF MAGISTRATE'S ANTI-CORRUPTION COURT

NAIROBI 3RD RESPONDENT

AND

JOHN OBURA DIMO EXPARTE APPLICANT

RULING

1. The application before this Court is the Ex parte Chamber Summons dated 27th February 2024. The application is brought under Order 53 Rule 1(2) of the Civil Procedure Rules. It seeks the following orders:
 - i. This Application be certified as urgent, heard ex parte and service thereof be dispensed with in the first instance.
 - ii. Leave be granted to the Applicant to commence judicial review proceedings and to apply for an order of Certiorari against the Respondents to remove into this Honourable court for purposes of being quashed the Charge Sheet dated 22.09.2023 and signed by Ann Gitau, Senior



Principal Prosecution Counsel instituting the criminal charges in Nairobi, Anti-Corruption Court Case Number MCAC/E007/2023.

- iii. That the leave so granted do operate as stay of the entire proceedings of the Nairobi Anti-Corruption Court in Anti-Corruption Court Case Number MCAC/E007/2023.
 - iv. Leave be granted to the Applicant to apply for an order of Prohibition to prohibit the 1st and 2nd Respondents from prosecuting the criminal/corruption charges contained in the Charge Sheet dated 22.09.2023 and signed by Ann Gitau, Senior Principal Prosecution Counsel as brought before Nairobi, Anti-Corruption Court Case Number MCAC/E007/2023.
 - v. The Costs of this application be in the cause
2. The application is supported by a Statutory Statement and Verifying Affidavit sworn by John Obura Dimo dated 27th February 2024.
 3. The Applicant was an employee of Keysian Auctioneers working as the Director Operations.
 4. On 5th November 2020, Keysian Auctioneers was appointed by Kenya Revenue Authority under the East African Community Customs Management Act, 2004 to levy distress upon the goods and chattels of Jenga Mabati Mills Limited the Ex- Applicant under instruction effected the distress on the same day.
 5. The Applicant was arrested by the 2nd Respondent and charge on 22nd September, 2023 via charge sheet signed by Ann Gitau, Senior Principal Prosecution Counsel instituting the criminal charges before the Anti-Corruption Court in Nairobi, Anti-Corruption Court Case Number MCAC/E007/2023 for demanding for a bribe of Kshs. 2 Million from Jenga Mabati Limited so as to write off tax arrears amounting to Kshs 19,456,309.00/-owed by the said Jenga Mabati Ltd to Kenya Revenue Authority (KRA).
 6. It is the Ex-Parte's case that The 1st Respondent is unreasonable and acted beyond its powers by charging him without any evidence after the 2nd Respondent had recommended the closure of the file for lack of evidence and that the charge and the trial is not in the interest of justice as required by Article 157 (11) of *the Constitution*.
 7. Ex-Parte Applicant states that he has a right to access to justice and fair hearing and that the Respondents are in breach of the right to a fair administrative action which arises in the normal course of business of the Respondents and that this court can grant any of the Judicial Review orders as enshrined in Article 23(3)(f).
 8. Further, the Ex-parte Applicant avers that despite him writing a letter of demand and complaint to the Respondent to remedy the breach thereby exhausting internal remedies available to him, the 2nd Respondent proceeded with charging him where the Complainant has no case against him, and where no criminal conduct is established, the 1st Respondent is violating its mandate under Article 157(6) and (6), of *the Constitution*.
 9. The Respondents oppose the Application through the affidavit of John Nyagara sworn on 2nd April, 2024.
 10. It is the Respondent's case that granting of leave to commence judicial review proceedings as prayed by the Ex- Parte applicant will amount to interference with the Director of Public Prosecution's constitutional and statutory mandate to institute and undertake criminal prosecutions, including the prosecution of corruption and economic crimes.



11. The 2nd Respondent citing Section 35 of *Anti-Corruption and Economic Crimes Act* (ACECA) claims it has authority to report to the Director of Public Prosecution (DPP) on the results of an investigation including any recommendation that EACC may have as to the prosecution or otherwise of a person for corruption or economic crime and that DPP is mandated under Section 5 of the Office of the Director of Public Prosecutions (ODPP) Act, 2013 to independently review the evidence and recommendation made relating to the findings of the investigation which power of prosecution is vested in the Director of Public Prosecution pursuant to Article 157 of *the Constitution*.
12. The 2nd Respondent further states that the decision to charge is the prerogative of the DPP. Therefore, it's recommendation is not binding upon the DPP and that the direction of the ODPP, in exercise of its constitutional and statutory mandate, and thus the ex-parte applicant was arraigned in court and charged on 26th February 2024.
13. It argues that the applicant has not presented a proper basis upon which the Court can grant leave for the filing of judicial review proceedings. The matters raised relate to the sufficiency of the evidence held against him, which would be evaluated by the trial court during trial where he will be afforded an opportunity to defend himself.

Analysis and determination;

14. Upon considering the Chamber Summons, Verifying Affidavit, the response on record and submissions by Counsel, the issue that presents itself for determination is whether the Application for leave to commence Judicial review proceedings is merited or not.
15. At the leave stage, the Applicant needs to make a prima facie case and demonstrate or satisfy the court that there is need to delve deeper into its case so as to establish that the Respondent acted ultra vires, irregularly or through procedural impropriety.
16. In exercise of its discretion, this court has the duty to determine whether or not the Applicant has made out a case that has a potential of fitting into a case that is within the Fair Administrative Act framework.
17. The Requirement to seek for leave to file 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 shall be made unless leave has been granted in accordance with the rule.
18. In *IRC v National Federation of Self-Employed and Small Businesses Ltd* (1982) 617, (1981) 2 ALL ER 93, 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 busy bodies, cranks and other mischief makers"
19. The Court in the case of *Republic v Registrar of Companies & another Ex parte Prakla East Africa Limited; Prakla Bohrtecknic GMBH (Interested Party)* [2021] eKLR held as follows;
 11. While in most cases it is self-evident that the matter should proceed to judicial review, there are a number of preliminary factors that a Court considers and addresses at the leave stage. These factors have been enumerated in *Judicial Review: Principles and Procedure* by Jonathan Auburn et al at paragraph 26.05 as follows:
 1. whether the enactment, action, decision, or failure to act that is being challenged is amenable to judicial review;
 2. whether the claimant has capacity to bring a claim for judicial review;
 3. whether the claimant has a sufficient interest to bring a claim for judicial review;



4. whether the particular challenge brought by the claimant is one that may be brought by the judicial review procedure, and whether it is appropriate to bring it by that procedure;
 5. whether the claim is otherwise an abuse of process;
 6. whether all or some of the grounds of challenge relied upon by the claimant are sufficiently meritorious to justify the grant of permission;
 7. whether the claim has been brought promptly;
 8. whether there are any discretionary grounds that justify the refusal of permission in the exercise of the court's discretion.
12. It therefore follows that the case must in the first place be one that is amenable to or appropriate for judicial review, and one that does not weigh against the exercise of the Court's discretion. This is for the reason that in judicial review, the Court is being asked to review the lawfulness of an enactment, decision, action or failure to act in the exercise of a public function. Therefore, judicial review concerns the exercise of public duties and not private duties. Some of the grounds that may influence the exercise of the Court's discretion in this regard with respect to the exercise of public duties are the availability of an adequate alternative remedy, prematurity of a claim, delay, and where the claim would cause great prejudice and hardship to third parties or the public interest. Lastly, the extent and limits of this Court's judicial review jurisdiction as set out in Article 165(6) of *the Constitution* must also be borne in mind.
13. Once a case is found to be amenable to and appropriate for the exercise of the Court's discretion to grant leave, it is trite that the Court then 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 *Sharma vs Brown Antoine* (2007) I 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."
20. The Court in *Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996* held that:
- “leave may only be granted if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the Applicant; the test being whether there is a case fit for further investigation at a full inter parties hearing of the substantive application for judicial review. Granting of leave to file for judicial review is an exercise of the court's discretion, but as always it has to be exercised judiciously.”
21. By dint of Section 35 of the *Anti-Corruption and Economic Crimes Act* (ACECA) the Director of Public Prosecution has the mandate to independently review evidence and does not require the consent of any person or authority in the exercise of its powers and functions.
22. It is not in dispute that there is a subsisting court case that is in the hearing stage and yet to be concluded where the Ex- Parte has the opportunity to defend himself and thus this court finds in as much it has discretion it would be improper for this court to interfere with the pending hearing by prohibiting the criminal proceedings against the Ex-parte Applicant. And it is not the duty of the judicial review court



to engage in an examination of the merit or otherwise of the charges to be preferred. The sufficiency or otherwise of the charges or evidence is left to the trial court.

23. In *Johnson Kamau Njuguna & Another vs Director of Public Prosecutions (2018) eKLR*, the court also restated the said principles as follows:

“It is settled law that the role of the court in a judicial review application of this nature is to ensure that an applicant is not dragged willy-nilly into court on criminal charges when there is no substantial evidence to sustain an indictment. The DPP has the authority and discretion to decide who, when and how to prosecute within the bounds of legal reasonableness. That role cannot be usurped by the court. If the DPP acts outside the bounds of legal reasonableness, however, he acts ultra vires and the court can intervene, because it is the court’s high responsibility and inherent power to secure fair treatment for all persons brought before the court, and to prevent an abuse of the court’s process.”

24. The circumstances when a court can intervene in a criminal prosecution was also the subject of the decision in *R vs. Attorney General exp Kipngeno Arap Ngeny, High Court Civil Application No. 406 of 2001* wherein it was held that:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.

Disposition:

25. This Court therefore finds that the Applicant has not demonstrated how the respondent has acted illegally, or abused its power, or acted ultra vires or irrationally in carrying out its investigative mandate and proceeding to charge the Applicant.

Order:

1. The Applicants’ Chamber Summons dated 27th February 2024 is found to be unmerited and the same is dismissed.
2. The Applicant to bear the costs of the suit.
3. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER, 2024.

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JOHN CHIGITI (SC)
JUDGE

