



Wahome (Suing on behalf of the Association of the Skilled Migrant Agencies of Kenya (ASMAK)) v Chief Magistrates Court at Milimani (Judicial Review E001 of 2023) [2023] KEHC 251 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEHC 251 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
JUDICIAL REVIEW E001 OF 2023
LM NJUGUNA, J
JANUARY 26, 2023**

BETWEEN

**FRANCIS NDUHIU WAHOME PETITIONER
SUING ON BEHALF OF THE ASSOCIATION OF THE SKILLED MIGRANT
AGENCIES OF KENYA (ASMAK)**

AND

CHIEF MAGISTRATES COURT AT MILIMANI RESPONDENT

RULING

1. The applicant herein moved this court by way of chamber summons dated January 16, 2023 and wherein he sought for orders that:
 - i) Spent.
 - ii) That leave granted to operate as stay of proceedings dated January 3, 2023 and stay of execution of order dated 04. 01. 2023 pending the hearing and determination of the notice of motion.
 - iii) That orders dated January 4, 2023 in Civil Suit No. MCCC E005 of 2023 Milimani Magistrates Court be quashed.
 - iv) Costs of this application be provided for.
2. The said application is premised on the grounds on its face and it's supported by the verifying affidavit by the petitioner. In a nut shell, it is the petitioner's case that on January 3, 2023 an application was filed against the National Industrial Training Authority and National Employment Authority seeking for orders, inter alia; that the respondent herein issues a temporary injunction against the two government agencies aforesaid; their servants, agents or any other person under their instructions, restraining them



from issuing and delivering certificates to trainees relating to Home Care Management pending the determination of the application.

3. It was averred that the aforesaid application was based on hearsay and/or unfounded claims in that, if indeed there were corruption claims against the two government bodies, the petitioner in the lower court case ought to file a suit and push for an anti-corruption suit before the relevant bodies. That the subordinate court overstepped its mandate by issuing orders without following the basic tenets of fairness and justice. In urging this court to grant the orders sought herein, it was argued that given that the petitioner herein is not a party to the suit, there is a likelihood that it might take long for it to be enjoined and therefore, the petitioner's agencies stand a chance to run at a loss. In the end, the petitioner urged this court to grant the orders as prayed.
4. The respondent despite being served did not participate in the proceedings herein and wherein, the court directed the petitioner to file submissions addressing it on the prayer of stay of execution.
5. The petitioner submitted that the orders sought herein are urgent for the reasons inter alia that the impugned orders were issued ex parte hence the petitioner was condemned unheard; that the trial court slated the matter for mention on January 30, 2023 and given that the said magistrate who issued the orders is on transfer, the same shall translate to negative impact on the petitioner's source of income for it shall take a while before the petitioner herein could be heard on the prayers sought herein. This court was therefore implored to grant the prayers sought as the actions by the subordinate court went against the tenets of natural justice. Reliance was placed on the cases of *Republic v Dedan Kimathi University of Technology* (E003 of 2021) and *Pastoli v Kabale District Local Council and others* [2008] 2 EA 300.
6. It was submitted that judicial review was the most viable and reliance was placed on articles 23, 50 and 165 of the *Constitution*. Further that article 165 of the *Constitution* gives this court unlimited original jurisdiction in criminal and civil matters in addition to supervisory jurisdiction over subordinate courts. This court was urged to grant the orders sought herein given that the petitioner represents over a thousand agencies who are on the verge of closing offices due to the illegally issued orders; additionally, that the longer the impugned orders remain in force, the more several livelihoods face the risk of losing the already elusive job opportunities. Reliance was placed on the case of *Republic v County Government of Embu Ex parte Peterson Kamau Muto t/a Embu Medical and Dental Clinic & 6 others*. [2022] eKLR. This court was therefore implored to grant the orders sought.
7. I have considered the application herein and I have perused through the annexures thereto. I have further considered the applicant's written submissions and it is my considered view that the main issue for determination is whether the orders sought herein can be granted.
8. It is trite that judicial review proceedings are mainly concerned with the process leading to the making of the decision and not the merits of the decision. The purpose of the remedy of judicial review is therefore to ensure that an individual is given fair treatment by the authority to which he or she has been subjected, and it is not part of that purpose to substitute the opinion of an individual judge for that of the authority constituted by law to decide the matter in question. The court in the case of *Republic v Kenya Revenue Authority Ex parte Yaya Towers Limited*, (2008) eKLR, held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. (See also the case of *Municipal Council of Mombasa v Republic Umoja Consultants Ltd*, Nairobi Civil Appeal No.185 of 2007(2002) eKLR).
9. The broad grounds on which the court exercises its judicial review jurisdiction were restated in the Uganda case of *Pastoli v Kabale District Local Government Council and others* [2008] 2 EA 300 and



wherein the court citing with approval the decision in Council of Civil Unions v Minister for the Civil Service [1985] AC 2 and an application by Bukoba Gymkhana Club [1963] EA 478 at 479 held that:-

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety are when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

10. It must be kept in mind that judicial review orders are concerned with the decision-making process rather than the merits of the decision. Therefore, judicial review proceedings ought not to be modified into a vehicle through which matters which ought to be ventilated in other forums are to be determined. [See John Fitzgerald Kennedy Omanga v The Postmaster General Postal Corporation of Kenya & 2 others Nairobi HCMA No. 997 of 2003].
11. Similarly, in The Republic v The Rent Restriction Tribunal and Z. N. Shah & S M Shah Ex Parte M M Butt Civil Appeal No. 47 of 1980 the Court of Appeal held that if there is an equally convenient, beneficial and effective remedy available, a court will generally decline to exercise its discretion in favour of the petitioner for a prerogative order.
12. I have had an opportunity to peruse the pleadings from which the orders by the trial court issued on January 4, 2023 emanated from, and without pre-empting the impending trial, I adopt the view that the petitioner herein is seeking to jump the gun by urging this Court to interfere prematurely with the laid-out process to be followed in any litigation process. The matters that he has raised in this application ostensibly would preferably be prosecuted before the trial court. I say so for the reason that judicial review only deals with the procedure and not substance. In the instant application, the applicant decries the fact that the trial court issued temporary orders as initially prayed by the plaintiff in MCCC/E005/2023; of importance to note is the fact that the petitioner herein is not even a party to the that suit, whose resultant orders the petitioner herein implores this court to exercise its discretion to review. [See Order 1 Rule 10(1) of the Civil Procedure Rules; Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2014] eKLR]. But even assuming that the applicant herein is a party in MCCC/E005/2023, I would still find that his application could still not be accommodated by the Judicial Review since his contention seems to be based on facts and the evidence and not the process. If indeed the applicant is aggrieved by the orders that were issued by the learned magistrate in MCCC/E005/2023, it should challenge the same in that suit as there is a pending substantive suit.
13. In the light of the foregoing, it is my humble view that a court ought to be extremely cautious in making its determination so as to avoid prejudicing the intended or pending court proceedings [See George Joshua Okungu & another v The Chief Magistrates Court, Nairobi & another [2014] eKLR; R v Monopolies and Mergers Commission ex parte Argyll Group Plc [1986] 1 WLR 763 and Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK).”]; and that notwithstanding, there is



now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in *Speaker of National Assembly v Njenga Karume* [2008] 1 KLR 425, where it held that;

“Irrespective of the practical difficulties enumerated... these should not in our view be used as a justification for circumventing the statutory procedure...In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions and statutory provisions.”

14. In the obtaining circumstances therefore, and for the fact that judicial review only deals with the procedure and not substance, I find that the petitioner’s case is really not related to the process per se but rather to substance. Therefore, the petitioner’s reprieve lies elsewhere and not in this court. [See *Daniel Ndungu v Director of Public Prosecutions & another* [2013] eKLR].
15. In light of the above findings, I hereby order as follows:
 - i) The application is dismissed.
 - ii) No order as to cost.
16. It is so ordered.

Delivered, dated and signed at Embu this 26th day of January, 2023.

L. NJUGUNA

JUDGE

.....**Petitioner**

.....**Respondent**

