Republic v Inspector General of Police & 2 others; Kimani & 12 others (Interested Parties); Kamere & another (Exparte Applicants) (Miscellaneous Application E096 of 2022) [2023] KEHC 1382 (KLR) (Judicial Review) (23 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1382 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION E096 OF 2022

AK NDUNG'U, J

FEBRUARY 23, 2023

BETWEEN

REPUBLIC .... APPLICANT

AND

INSPECTOR GENERAL OF POLICE .... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS .... 2ND RESPONDENT

MILIMANI CHIEF MAGISTRATE'S COURT .... 3RD RESPONDENT

AND

MONICAH NJOKI KIMANI .... INTERESTED PARTY

MOSES KINYANJUI KIMANI .... INTERESTED PARTY

VIRGINIA WAITHERA KIMANI .... INTERESTED PARTY

ELIZABETH WANJIKU KIMANI .... INTERESTED PARTY

JOHNSON MWAURA KIMANI .... INTERESTED PARTY

AGNES WAMBUI KIMANI .... INTERESTED PARTY

NANCY WANJIRU KIMANI .... INTERESTED PARTY

JULIET WAMBUI NGANGA .... INTERESTED PARTY

FRANCIS NGANGA MIRINGU .... INTERESTED PARTY

JOSEPH KARANJA NJOROGE .... INTERESTED PARTY

PATRICK MUCHAI NGARUIYA .... INTERESTED PARTY

GABRIEL MWAURA NG'ANG'A .... INTERESTED PARTY

RUTH WAMBUI THUNGU .... INTERESTED PARTY

AND

SIMON KAMERE .... EXPARTE APPLICANT

ALICE MUTHONI MWANGI .... EXPARTE APPLICANT

RULING

1. By a Chamber Summons application dated 15th July, 2022 the Applicant seeks the following orders:

    1. That this Application be certified as urgent and service be dispensed with in the first instance.

    2. That the *ex-parte* Applicants be granted leave to apply for judicial review orders of:

        a. Certiorari to remove into this honourable court and quash the 2nd Respondents decision to charge and prosecute the *ex-parte* Applicants as contained in the charge sheet approved by the 2nd Respondent on 14th June, 2022 in Milimani Chief Magistrate's Court Criminal Case no E391 2022: *Republic v Simon Kamere and Alice Muthoni Mwangi*

        b. Certiorari to remove into this honourable court and to quash the 3rd Respondent's decision to admit the charge sheet approved by the 2nd Respondent on 14th June, 2022.

        c. Certiorari to remove into this honourable court and quash all the proceedings in Milimani Chief Magistrate's Court Criminal Case no E391 2022: *Republic v Simon Kamere and Alice Muthoni Mwangi* in their entirety;

        d. Prohibition forbidding the 1st, 2nd and 3rd Respondents from conducting any further proceedings whatsoever in Milimani Chief Magistrate's Court Criminal Case no E391 2022: *Republic v Simon Kamere and Alice Muthoni Mwangi*.

        e. Prohibition forbidding the 1st Respondent, its employees, servants and/or agents from harassing, summoning, arresting and/or intimidating the ex- parte Applicants over the will of *Pius Kimani Mwaura (Deceased)*.

        f. Prohibition forbidding the 2nd Respondent from instituting any further or future charges against the ex- parte Applicants based on the same complaint or facts the subject of Milimani Chief Magistrate's Court Criminal Case no E391 2022: *Republic v Simon Kamere and Alice Muthoni Mwangi*.

    3. That the Leave granted does operate as stay restraining the Respondents from continuing with any proceedings whatsoever in Milimani Chief Magistrate's Court Criminal Case no E391 2022: *Republic v Simon Kamere and Alice Muthoni Mwangi* pending the hearing and determination of the main Notice of Motion.

    4. That Costs be provided for.

2. Which Application is based on the grounds:

1. That the proceedings in Milimani Chief Magistrate's Court Criminal Case no E391 2022: *Republic v Simon Kamere and Alice Muthoni Mwangi* were instituted pursuant to a complaint lodged with the police by the 1st Interested Party.

2. That the 1st interested party complained that the *ex-parte* Applicants forged the will of her late father Pius Kimani Mwaura (Deceased) dated 29th May 2014 with the intent to defraud the estate of the said *Pius Kimani Mwaura (Deceased)*.

3. That Pius Kimani Mwaura (Deceased) was a longtime client of the 1st *ex-parte* Applicant and the subject criminal proceedings arise from work done by an advocate for a client and are a mockery to the sacred advocate- client relationship

4. That the criminal proceedings are prejudicial to the *ex-parte* Applicants and inimical to public interest and ought to be stayed pending full consideration of the context and circumstances of the case by this Honourable Court.

5. That the prosecution of the *ex-parte* applicants is against public policy and if allowed to continue will encourage capricious prosecution of Advocates which interferes with the independence of the bar and causes erosion of the constitutional democracy that continue to be built slowly and painstakingly.

6. That the prosecution of the *ex-parte* Applicants lacks a proper factual basis since a prima facie perusal of the witness statement and documents by the witnesses in the criminal case do not show any benefit the disputed Will conferred on the ex-parte Applicant or any intention to defraud.

7. That a prima facie perusal of the witness statement show that the evidence the 2nd Respondent intends to rely on in the criminal proceedings is majorly hearsay.

8. That the Will in question is subject of litigation in two civil cases namely Milimani High Court Citation 1486 of 2019 and Milimani High Court Citation E. 763 of 2020 filed in the Family Division of the High Court of Kenya at Nairobi.

9. That in the two civil cases quoted above, the validity of the Will is an issue for determination.

10. That the beneficiaries of Pius Kimani Mwaura (Deceased) are divided into two factions. The first faction is made up of the 1st to the 6th Interested party who are dissatisfied with the contents of the Will of the Deceased and allege that the Will was forged. The second faction is made up by the 7th to the 9th Interested party who are happy with the contents of the Will and maintain that it is genuine.

11. That the *ex-parte* Applicants are victims caught up in the crossfire of family wrangles over inheritance and their prosecution is without any proper basis.

12. That the criminal proceedings have been instituted for extraneous purposes of helping some of the interested parties advance their claims in the aforesaid civil cases and they are a blatant abuse of prosecutorial powers and the Court process.

13. That the decision by the 2nd Respondent to prosecute the ex-parte Applicant is irrational, illegal and a flagrant abuse of power. The decision contravenes Article 157 (11) of the *constitution* and this Honourable Court is entitled to quash it.

14. That the criminal proceedings mounted against the *ex-parte* Applicants are oppressive and vexatious.

15. That the criminal proceedings put the *ex-parte* Applicants' right and freedom of liberty to the test on flimsy and frivolous grounds and at the pleasure and self-interests of the 1st to the 6th Interested party.

16. That the arraignment and charging of the 1st ex- parte has been published in print and audio-visual media putting his long career and a good reputation he has built for the last forty-three (43) years is at the risk of being ruined.

17. That it is in the interest of justice that the Application is allowed.

3. The application is opposed and on record are replying affidavits of Monicah Njoki Kimani (Monica) and CI Brenda Omwenga (Brenda) who was part of the investigating team at DCI. Land Fraud Investigation Unit.

4. The thrust of Brenda's affidavit is that a report was lodged at DCI Headquarters by one Monica Njoki *vide* a complaint letter dated 7th April 2020. The matter was minuted to Brenda together with PC Nicholas Muiruri and CPL David Ndiema to conduct investigations. Brenda avers that it is the lawful duty of the DCI to conduct criminal investigations and process as mandated by section 35 of the *National Police Service Act*, Chapter 84, Laws of Kenya.

5. Investigations which included document examination and a report thereto were conducted and file forwarded to the 2nd Respondent who recommended that the Applicants herein be charged with the offence of forgery. The Applicants were arraigned before the Magistrate's Court at Milimani on the 14th June 2022 in Criminal Case no E 336 of 2022. Brenda defends the process in the investigations and eventual charges and arraignment as in accordance with the law and is validly within the meaning and intents of criminal prosecution. It is urged that the trial process is an avenue for the Applicants to defend themselves on the allegations made against them. She adds that the accuracy correctness of the evidence in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and adduced in support of the charges. Brenda maintains that the Applicants have failed to establish that the Respondents acted capriciously, in bad faith or abused the legal process.

6. On her part, Monica depones that it clear that the Applicants have been enjoying all their rights to a fair trial before the criminal court and were granted bail without opposition from the DPP. The court should not usurp the powers of other competent bodies to decide on contested matters currently before a competent body. It is her case that the application before court is an attempt to scuttle a legitimate trial. The contents of the verifying affidavit are denied at length and Monica avers that the Applicants have all the opportunity before the trial court to establish that the cases against them are fabricated.

7. It is urged that this is not the forum for the Applicant to agitate the claim of alleged defamation as there exists the correct channel to pursue. It is added that the non- criminal cases referred to by the Applicants were instituted and are being prosecuted by and /or under the stewardship of a firm of Advocates believed to be a proxy of the 1st Applicant and the same have been proceeding independently of the criminal case.

8. The 2nd and 5th Interested Parties responded to the application vide the replying affidavit of Moses Kinyanjui Kimani who swore it with authority of the 5th Interested Party. Kimani depones that the subject will was by his father, Pius Kimani Mwaura through the firm of the 1st Applicant. He avers that all beneficiaries attended a meeting where they were all advised of the will. One of the beneficiaries, Jackson Miringu Kimani cited 1st, 2nd, 3rd, 4th, 5th and 6th Interested Parties in Citation Cause no 1486

of 2019 to accept or refuse citation. The court directed that the will be filed in court within 7 days. Further, that despite the will having been read to all the parties, the 1st Interested Party made a complaint at DCI alleging that the will was forged. The 1st Interested Party is accused of intending to prejudice the true beneficiaries in an attempt to delay the succession cases and with an aim to enrich herself. It is sought that the application herein be allowed.

9. The 7th, 8th and 9th Interested parties in an affidavit sworn by Nancy Wanjiru Kimani aver that the 1st Applicant has been the deceased's lawyer for over thirty years. The deceased had executed a will with the firm dated 9th September 2014. Upon invite by the 1st Applicant to all parties, the will was read on the 17th March 2020 in presence of all the Interested Parties. Nancy adds that together with her brother Jackson Miringu Kimani they filed a citation, being Citation Cause no 1486 of 2019 citing the 1st, 2nd, 3rd, 4th, 5th and 6th Interested Parties to accept or refuse probate. Another Citation, being Citation no, E763 of 2020 was filed seeking to compel the Trustees named in the Will to exercise their mandate. It therefore came as a surprise when despite existence of directions of court on the matter, Monica made a report to DCI alleging that the Will was forged. Parties were all summoned to DCI where they recorded their statements. Nancy adds that the allegations at DCI are meant to scuttle the succession process and deny the beneficiaries the rightful shares bequeathed to them.

10. The 1st Applicant filed a supplementary affidavit sworn on the 22nd August 2022 in which he generally denies the allegations in the replying affidavits. In summary, he avers, inter alia, that Brenda Omwenga fails to mention in her affidavit that the police recorded statements from 2 beneficiaries, namely, Nancy Wanjiru Kimani and Jackson Miringu Kimani which statements confirmed that the alleged Will was valid.

11. He clarifies that he was initially charged in MCCR E336 of 2022. The 2nd Applicant was charged in MCCR E 391 of 2022. When the 2 cases were consolidated, the charges were now continued as MCCR E 336 of 2022. He adds that the 2nd Applicant has sworn a supplementary affidavit confirming authority of the 1st Applicant to swear and plead on her behalf.

12. The 2nd Applicant swore a supplementary affidavit swore an affidavit sworn on 22nd August 2022 in which she confirms that she is charged together with the 1st Applicant in MCCR E 336 OF 2022 after the case no MCCR E391 in which she had initially been charged was consolidated with MCCR E 336 of 2022 in which the 1st Applicant had been charged earlier. She adds that she authorised the 1st Applicant to swear the verifying affidavit and plead on her behalf and hence she supports the averments thereof.

13. I have had occasion to consider the application, the statutory statement, the verifying affidavit and the responses (some in support and others in opposition to the application). I have had due regard to the submissions by the respective counsels and put into account the applicable law. Twin issues crystalize for determination viz;

    1. Whether the Applicants have established the legal threshold for the grant of leave to institute judicial review proceedings.

    2. If issue 1 above answers in the affirmative, whether the leave so granted should operate as a stay of the impugned charges and trial.

14. The law on parameters for consideration in the grant of leave to institute judicial review proceedings is well settled. As to whether the Ex Parte Applicant has established grounds to warrant the leave sought, it is important to consider why such leave is necessary in the first place. This question was eloquently

answered by Waki J (as he then was) in *Republic v County Council of Kwale & another Ex parte Kondo & 57 others*, Mombasa HC Misc. Application no 384 of 1996 as follows:

> "... is to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the application is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the Court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public offices and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived." (See also *IRC v National Federation of Self-Employed and Small Businesses Ltd* (1982) 617, (1981) 2 ALL ER 93).

15. I would extrapolate on this dictum and add that the seeking of such leave ring fences the mandates of constitutionally or statutorily established bodies and insulates the court from unwelcome invites to usurp the mandates of such bodies. The court is thus expected to sieve the applications for leave before it to ensure that only deserving applications that meet the legal muster find their way at a judicial review hearing.

16. To succeed in an application for leave, the Applicant ought to establish certain factors. Mativo J (as he then was) in *Republic v Kenya Revenue Authority Commissioner Ex Parte Keycorp Reals Advisory Limited* [2019] eKLR in which he cited with approval the decision in *Meixner & another v A.G* [2005] KLR 189 correctly summed up the factors. At the leave stage the Applicant must show that: -

    i. Sufficient interest in the matter otherwise known as locus standi.

    ii. He/she is affected in some way by the decision being challenged.

    iii. He/she has an arguable case and that the ease has a reasonable chance of success.

    iv. The application must be concerned with a public law matter that is the action must be based on some rule of public law.

    v. The decision complained of must have been taken by public body, that is a body established by statute or otherwise exercising a public function."

17. In *Ex Parte Keycorp Reals Advisory Limited* (*supra*), the learned judge stated:

> "At the leave stage, the Applicant has the burden of demonstrating that the decision is illegal, unfair and irrational. The Applicant must persuade the Court that the application raises a serious issue. This is a low threshold. A serious issue is demonstrated if the Judge believes that the Applicant has raised an arguable issue that can only be resolved by a full hearing of the judicial review application. If the Court is not persuaded as aforesaid, leave will be denied and the matter proceeds no further."

18. It is trite law that in an application for leave, 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. This point was stressed in the case

of *Njuguna v Ministry of Agriculture* [2001] 1 EA as quoted in the case of *Uwe Meixner & another v Attorney General* [2005] eKLR Where the court stated as follows: -

> "… leave should be granted, if on the material available the court considers without going into the matter in depth that there is an arguable case for granting leave".

19. In *Re Bivac International SA (Bureau Veritas)* [2005] 2 EA 43 (HCK), the Court stated:

> "Application for leave to apply for orders of judicial review are normally ex parte and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court's discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him…. Like the Biblical mustard seed which a man took and sowed in his field and which the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stemmed from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. One can safely state that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of Donoghue vs. Stephenson in the last century. Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of John vs. Rees"

20. The power to grant or deny leave is discretionary on the part of the court. Like all discretionary powers, it must be exercised judiciously. It is the law that whenever the court is invested with the discretion to do certain act as mandated by the statute, the same has to be exercised judiciously and not in an arbitrary and capricious manner. The classic definition of discretion by Lord Mansfield in *R v Wilkers*(1770)4 Burr 2527,2539:98ER was that discretion when applied to courts of justice, means sound discretion guided by Law. It must be governed by rule, not by humor: it must not be arbitrary, vague, and fanciful but legal and regular.

21. In exercise of discretion the court has to consider various factors chief among them the need to do real and substantive justice to the parties in the suit. It must be exercised in accordance with sound and reasonable judicial principles. The King's Bench in Rookey's Case stated as follows: -

> "Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigor of it, but in no case does it contradict

or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power, which neither this nor any other court, not even the highest, acting in a judicial capacity, acting in a judicial capacity is by the constitution entrusted with."

22. Have the Applicants met the legal threshold necessary for the grant of leave? I start by getting out of the way 2 preliminary issues relating to Authority of the 1st Applicant to plead on behalf of 2nd Applicant and the question whether the reference in the application to Criminal Case no MCCR E391of 2021 instead of Criminal Case no E 336 of 2022 renders the grant of leave an exercise in futility since MCCR no E 391 of 2022 ceased to exists on 14th June 2022. In answer to these questions, I note that the 2nd Applicant has sworn an affidavit confirming authority to plead given to the 1st Applicant. On the 2nd question, it is obvious, and counsel for the Applicants mentioned as much in oral submissions, that the reference to MCCR no E391 of 2022 arose out of a typographical error and the targeted case ought to be MCCR E 336 of 2022.

23. The disclosed facts show that initially the 1st and 2nd Applicants were charged separately in MCCR E 336 of 2022 and MCCR E 391 OF 2022 respectively. The charges were then consolidated and the prosecution is to be conducted in the consolidated case in MCCR 336 of 2022. Any party participating in these proceedings is aware which is the live criminal matter under reference. The error in the reference to MCCR E 391 0f 2022 in the chamber summons is not material. It is an error that the court in its own motion can correct in a bid to do real and substantive justice to the parties. It is noteworthy that the 1st and 2nd Respondents who are the drivers of the investigations and the prosecution raise no issue on this matter, and this, in my view, for the reason that it is obvious that the judicial review application targets the live criminal case and which is MCCR E 336 of 2022. This set of facts must be distinguished from the case of *Republic v Chief Magistrate's Court Nairobi, ex parte Jeff Koinange and 11 Others* [2017] eKLR in which the amendment that was needed was material.

24. Getting onto the question of leave, I note that the parties have expended lots of energy in arguing the merits of their respective cases and that is excusable in that, in an attempt to establish an arguable case or lack of it, as the case may be, aspects of the strength of a party's case must come into play.

25. Am well aware that at this stage it is not required of this court to delve deeply into the arguments of the parties for or against the grant of the envisaged judicial review orders. Am called upon to make a cursory perusal of the material before court and make a finding as to whether an arguable case is established that requires further interrogation at a substantive hearing. The charges and the impugned prosecution revolve around the administration of the estate of Pius Kimani Mwaura (deceased) which administration has hit early headwinds with serious disagreements arising between the beneficiaries to the estate who are children of the deceased. 2 applications being HC P&A E 763 of 2020 and HC P&A 1486 of 2019 have been filed before the probate court.

26. The Applicants are charged with forgery of a Will allegedly made by the deceased. I take cognisance that the impugned charges arise from activities related to the 1st Applicant's practice of law and the client relationship between him and the deceased on the one hand, and to the activities of the 2nd Applicant in the course of her employment in the legal firm of the 1st Applicant. The dispute over the will has already found its way to the probate court. There are serious allegations and counter allegations in affidavits as to the propriety of the process leading to the charges and the charges themselves. One cannot rule out the fact that the fierce sibling rivalry evident in the matter could obfuscate issues and interfere with objectivity in the investigations and the charges. The circumstances obtaining would require further interrogation at a substantive stage.

27. On the material before court, the Applicants have demonstrated that they have sufficient interest in the matter, they are certainly affected in some way by the decision being challenged, they have established an arguable case and that the case has a reasonable chance of success, the application is concerned with a public law matter and the decision complained of was taken by public body i.e. the Inspector General of police, the DPP and the Milimani Magistrate Court.

28. Within this background, am persuaded that an arguable case is established and this court ought to allow a further ventilation before court of the issues regarding the propriety or otherwise of the investigations and the resultant charges and prosecution. The prayer for leave is thus merited.

29. As to whether the leave so granted should operate as a stay, courts are guided by various factors such as whether the decision is complete or is of a continuing nature. In the case of *James Opiyo Wandayi vs Kenya National Assembly & 2 Others*, (2016) eKLR, it was held that;

> "it is only where the decision in question is complete that the Court cannot stay the same. However, where what ought to be stayed is a continuing process, the same may be stayed at any stage of the proceedings."

30. The key concern is to ensure that the outcome of the judicial review proceedings is not rendered nugatory. Maraga, J (as he then was) in *Taib A. Taib v The Minister for Local Government & Others* Mombasa HCMISCA. no 158 of 2006 expressed himself as follows:

> "As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction... In judicial review applications the Court should always ensure that the ex parte applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act... A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted."

31. Having considered the circumstances of this case, and fully aware that a criminal trial is not a one off event, am satisfied that an order of stay would serve the wider interests of justice.

32. With the result that the application dated 15th July 2022 is merited and is hereby allowed. I make the following orders;

    1) Leave be and is hereby granted in terms of prayers 2 (a), (b), (c), (d), (e) and (f).

    2) The substantive motion be taken out and served within 21 days hereof.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2023

A. K. NDUNG'U

JUDGE