



**Republic v Director of Public Prosecutions & 2 others; Kaithungu  
& another (Exparte Applicants) (Judicial Review Application  
E001 of 2022) [2023] KEHC 17704 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17704 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
JUDICIAL REVIEW APPLICATION E001 OF 2022**

**LW GITARI, J**

**MAY 25, 2023**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL  
REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**IN THE MATTER OF: ARTICLES 22, 23, 47, & 50 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: THE LAW REFORM ACT, CAP 26 OF THE LAWS OF KENYA**

**IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES 2010**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**NJUE KAITHUNGU ..... EXPARTE APPLICANT**

**MICHENI KIBATI SAMSON ..... EXPARTE APPLICANT**

**JUDGMENT**

1. Through the notice of motion application dated March 17, 2022, the *ex-parte* applicants herein, Njue Kaithungu and Micheni Kibati Samson, pray for the following orders:



- i. That an order of *certiorari* do issue to remove this honourable court and quash the decision of the 2<sup>nd</sup> respondent to arrest the *ex-parte* applicants and the decision of the 1<sup>st</sup> respondent to recommend the prosecution of the *ex-parte* applicants on allegations of neglect to protect coffee factories against fictitious renovations projects.
  - ii. That an order of prohibition do issue directed to the respondents, their officers and any other authority acting on their instructions from arresting or prosecuting the *ex-parte* applicants on allegations of neglect to protect coffee factories against fictitious renovations projects.
  - iii. That the costs of this application be provided for.
2. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents herein are the Director of Public Prosecution, the Director of Criminal Investigations, and the Attorney General respectively.
3. On the other hand, the *ex-parte* applicants' state that they are employees of the County Government of Tharaka Nithi where the 1<sup>st</sup> *ex-parte* applicant holds the position of the County Executive Committee Member for Agriculture, Livestock, Fisheries and Co-operatives while the 2<sup>nd</sup> *ex-parte* applicant holds the position of Chief Officer, Agriculture and Co-operative.
4. A brief background of the *ex-parte* applicants' case is that on the morning of February 22, 2022, the 2<sup>nd</sup> respondent arrested and locked up the *ex-parte* applicants at Chuka Police Station and denied them the right to be released on cash bail. That the *ex-parte* applicants were later released from the police station at night and were not presented before any court of law.
5. It is further the *ex-parte* applicants' case that the 1<sup>st</sup> respondent recommended that the *ex-parte* applicants be charged with the offence of neglect in the performance of public duties contrary to section 128 of the *Penal Code* (chapter 63 of the Laws of Kenya) and the offence of aiding and facilitating of a felony contrary to section 128A(a) of the *Penal Code*.
6. The *ex-parte* applicants consequently moved this court on February 23, 2022 seeking leave to commence judicial review proceedings against the respondents and the leave, if so granted, to act as a stay of any decision by the respondents to arrest, commence, or conduct criminal proceedings against the *ex-parte* applicants. On February 25, 2022, this court granted the leave sought by the *ex-parte* applicants and ordered that the leave to act as a stay of any decision by the respondents against the *ex-parte* applicants.
7. Despite the respondents being duly served with said orders of the court, the 1<sup>st</sup> respondent, on March 10, 2022, presented a charge sheet at Chuka Magistrates' Court under Criminal Case No 150 of 2022 with the intention to charge the *ex-parte* applicants for various offences. The court however ordered that the *ex-parte* applicants could not be charged as there was an existing valid order barring their prosecution.
8. It is thus the *ex-parte* applicants case that the 2<sup>nd</sup> respondent's decision to arrest the *ex-parte* applicants and the 1<sup>st</sup> respondent's decision to charge them were tainted with illegality. Further, that the *ex-parte* applicants had nothing to do with the offences contained in the aforesaid charge sheet which offences related to the alleged fraudulent dealings in several Co-operative Societies in Tharaka Nithi county.
9. According to the *ex-parte* applicants, it had been alleged that the management committees of the said co-operative societies had entered into contracts with 3<sup>rd</sup> parties for renovations of their coffee factories. The *ex-parte* applicants maintained that as employees of the County Government of Tharaka Nithi County, they had no control, direct or otherwise, over the governance of the said co-operative societies.



10. It is thus the *ex-parte* applicants' case that unless the judicial review orders sought herein are granted by this court, they will be unfairly subjected to an unprocedural and unlawful judicial criminal process.
11. The present application was strongly opposed by the respondents *vide* the replying affidavit sworn by one PC Stephen Waweru on May 16, 2022. It was their case that the present application ought to be dismissed for being premature, frivolous, vexatious, bad in law, and fatally defective.
12. The said PC Stephen Waweru stated that he is a police officer attached to the Directorate of Criminal Investigations, Meru South and that he is the investigation officer in the case against the *ex-parte* applicants, which case forms the basis of the instant application.
13. Further, the said PC Stephen Waweru deposed that in the month of October, 2021, the DCI Tharaka Nithi county received information that there were several coffee factories within the said county that had been deceived into entering into fictitious agreements for the refurbishment or construction of the coffee factories, by one Caroline Kuthie Karanja, who was representing herself as a representative of the International Coffee Organization.
14. That the said Caroline Kuthie Karanja had engaged various coffee factories and informed them that she had been funded by donors and that she was spearheading plans to renovate the coffee factories in the county. Further, that the said Caroline Kuthie Karanja advised managers of various factories to advertise for tenders and that contractors were selected and awarded contracts to renovate the factories against the tender processes.
15. PC Staphen Waweru avers that he conducted his investigations into the matter and established that the said Caroline Kuthie Karanja was not an employee or representative of the International Coffee Organization as she had alleged. Further, that she was working with unscrupulous county employees, particularly the *ex-parte* applicants herein, to further her illegal activities of deceiving factory managers and society officials into entering into fictitious projects. It is thus the respondents' case that the decision to charge the *ex-parte* applicants was arrived at fairly after a careful evaluation of the evidence that had been collected and that the issues they are raising should be best addressed before the trial court in their defence.
16. In responding to the affidavit of the above named PC Stephen Waweru, the *ex-parte* applicants filed a supplementary affidavit sworn on August 15, 2022 by the 1<sup>st</sup> *ex-parte* applicant on his own behalf and on behalf of the 2<sup>nd</sup> respondent. It is deposed therein that the affidavit of PC Stephen Waweru is incompetent and inadmissible as the said PC Stephen Waweru is neither an employee of the 1<sup>st</sup> respondent nor is his authorized by law or by the 1<sup>st</sup> respondent to swear affidavits on behalf of the 1<sup>st</sup> respondent.
17. The *ex-parte* applicants further denied attending any meetings that the above-mentioned Caroline Kuthie Karanja had organized. They also denied ever launching any renovation exercise in any coffee factory in Tharaka Nith County with the said Caroline Kuthie Karanja. They thus maintained that they only became aware of the alleged fictitious projects after the 1<sup>st</sup> respondent took over the investigations.
18. The present application was canvassed by way of written submissions which I have hereunder highlighted.

### **The Ex-Parte Applicants' Submissions**

19. It is the submission by the *ex-parte* applicants that the process followed by the respondents throughout the investigation stage, arrest and intended prosecution was neither fair nor objective or procedural.



That the conduct of the 1<sup>st</sup> respondent in presenting a charge sheet before court on March 10, 2022 with the intent of prosecuting the *ex-parte* applicants was in violation of a valid court order and an indication of the extent the 1<sup>st</sup> respondent is willing to go in an attempt to achieve ulterior motives. Further, it was the submission by the *ex-parte* applicants that unless the orders of judicial review sought herein are granted, the stand to suffer irreparable harm and injury.

20. In relying on various decisions including the cases of *Council of Mombasa v Republic & Umoja Consultants Ltd* civil appeal No 185 of 2002; and *Isaac Gathungu Wanjobi & another v Director of City Planning of Nairobi & another* [2014] eKLR, the *ex-parte* applicants submitted that this court is empowered to oversee that the offices of the 1<sup>st</sup> and 2<sup>nd</sup> respondents undertake their mandated functions in accordance with the law. That while the remedy of judicial review has always been concerned with the decision-making process and not the merits of the case, article 47 of the *Constitution* has now expanded the grounds of judicial review to include reasonableness of a decision while section 7(2)(1) of the *Fair Administrative Action Act* provides for proportionality as a ground for statutory judicial review. It was thus the *ex-parte* applicants' submissions that the interest of justice dictates that the orders sought herein be issued as prayed.

### **The 1<sup>st</sup> Respondent's Submissions**

21. Citing the case of *Republic v National Employment Authority & 3 others Ex-Parte Middle East Consultancy Services Limited* [2018] eKLR, it is the respondents' submission that the *ex-parte* applicants have not demonstrated a case worth this court's intervention through judicial review. That the role of this court in judicial review is to look at the decision making process of a given decision, and not at the merits of the decision complained of.
22. According to the respondents, the *ex-parte* applicants committed an offence that is known in law, leading to their arrest and subsequent prosecution. That the *ex-parte* applicants are using these judicial proceedings to raise a defence to the commission of an offence yet it is the trial court, in which they are charged, that has the requisite jurisdiction to hear and determine the respective cases by the parties. The respondents thus urged this court to dismiss the present application.

### **Issues for Determination**

23. From the above summarized allegations and submissions by the parties, it is my view that the following issues arise for determination by this court:
- i. Whether the decisions by the respondents to arrest, detain, and prosecute the *ex-parte* applicants were unlawful.
  - ii. Whether the *ex-parte* applicants are entitled to the orders sought in the present application.

### **Analysis**

24. The case by the *ex-parte* applicants is that their arrest and intended prosecution was unlawful, unreasonable, made in bad faith, and intended to achieve ulterior motive.
25. The starting point here will be to state that the offices of the 2<sup>nd</sup> and 1<sup>st</sup> respondents are empowered by the law to investigate and prosecute criminal offences [see section 24 of the *National Police Service Act* and articles 243, 245 and 157 of the *Constitution*]. However, the powers of the respondents must be exercised in accordance with the law. Where investigations are conducted outside the confines of the law, and where the DPP continues with prosecution in abuse of power, the courts are empowered



- to quash such prosecution. In this case, the onus lay with the *ex-parte* applicants to prove that their prosecution was hinged on bad faith or illegality.
26. The *ex-parte* applicants herein have all throughout maintained that their arrest and the recommendation of their prosecution were procedurally unfair and unreasonable. That they have no supervisory powers over co-operative societies and hence should not be prosecuted for their mismanagement. Further, that the conduct of the 2<sup>nd</sup> and 1<sup>st</sup> respondents of arresting them deprived them of their freedom and that their prosecution was politically instigated.
27. I have carefully considered the annexure attached to the affidavit sworn on May 16, 2022 by PC Stephen Waweru. In my view, the *ex-parte* Applicants have not demonstrated that there is an element of illegality in the conduct of the respondents. It is alleged that they colluded with one Caroline Karanja and allegedly engaged in fraudulent activities, all in the while the said Caroline Karanja was representing herself as an official of International Coffee Organization. If the allegation is true, then the only way to establish the innocence or guilt of the *ex-parte* applicants is through a criminal trial. This court cannot sit as a trial court and hear the witnesses to be called in order to return the verdict of whether or not the *ex-parte* applicants are guilty. That duty lies with the trial court and the *ex-parte* applicants are guaranteed a fair trial by virtue of the provisions in the *Evidence Act* and article 50 of the *Constitution*.
28. In the end, it is my view that the respondents have clearly demonstrated that the 2<sup>nd</sup> respondent received a complaint of the commission of an offence. Following the same, the 2<sup>nd</sup> respondent were duty bound to investigate the complaint raised against the *ex-parte* applicants herein as the law required them to do so.
29. In addition, article 157 of the *Constitution* vests state power of prosecution upon the Director of Public Prosecution, which power is reinstated in *pari materia* under section 5 of the *Office of Director of Public Prosecutions Act*, where it is provided in no uncertain terms that in the exercise of this power, the 1<sup>st</sup> respondent is not under the direction or control of any person, body or authority as provided for under article 157(10) of the *Constitution*. The prosecutorial decision of the 1<sup>st</sup> respondent is therefore not subject to the power and control of any one while discharging its mandate and that the courts would only interfere where it is shown the DPP acted *ultravires*, unreasonably, without procedural fairness, malafides and in total disregard of proportionality in decision making. In this case, it is my view that no reasons have been advanced by the *ex-parte* applicants to that effect and to justify this court's interference and proceeding to grant the orders sought.

## Conclusion

30. For the reasons given herein above, it is my view that the present application is without merits.

I order that:-

1. This petition is dismissed
2. I make no orders as to costs.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 25<sup>TH</sup> DAY OF MAY 2023.**

**L.W. GITARI**

**JUDGE**

**25/5/2023**

Mr. Muthomi for Applicant



Ms Mbithe for Respondent

The Judgment has been read out in open court.

**L.W. GITARI**

**JUDGE**

**25/5/2023**

