



Kiio & 4 others v Director of Public Prosecution & another (Judicial Review Application E002 of 2023) [2023] KEHC 21208 (KLR) (4 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21208 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E002 OF 2023**

OA SEWE, J

AUGUST 4, 2023

**IN THE MATTER OF ARTICLE 157 OF THE CONSTITUTION OF
KENYA 2010**

AND

**IN THE MATTER OF SECTIONS 8 & 9 OF LAW REFORM ACT,
CHAPTER 26 OF THE LAWS OF KENYA**

AND

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

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY
FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND
PROHIBITION**

BETWEEN

**PETER KIIO 1ST APPLICANT
MUNA MOHAMED SOBA 2ND APPLICANT
JUSTUS WAFULA 3RD APPLICANT
PAUL WAGWA 4TH APPLICANT
AYUB OTIENO 5TH APPLICANT**

AND

THE DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT



RULING

1. Before the court for determination is the chamber summons dated January 18, 2023. It was filed by the applicants under articles 10, 22, 23, 25, 27, 47, 48 and 232 of the Constitution of Kenya, sections 3 and 11 of the Fair Administrative Action Act, 2015, sections 8 and 9 of the Law Reform Act, chapter 26 of the Laws of Kenya and order 53 rule 1(3) and (4) of the Civil Procedure Rules for orders:
 - (a) that leave be granted to the applicants to apply for the following judicial review orders:
 - (i) A declaration that the applicants were rightful and dutiful in the discharge of their constitutional mandate on the March 27, 2020 during patrol for enforcement of the Covid-19 nationwide curfew;
 - (ii) A declaration that the applicants did not have any premeditated involvement in the incident that resulted in the death of the deceased;
 - (iii) An order of *certiorari* to bring to the high court for the purpose of quashing the decision to charge the applicants with the offence of murder and/or further charges in relation to the death of the deceased, namely, Hamisi Juma Idd Khambirwa.
 - (iv) An order of prohibition to prohibit the respondents from interfering in any way with the discharge of the constitutional mandate of the applicants;
 - (b) That leave so granted does act as a stay of the decision to charge the applicants with the offence of murder until the determination of the substantive application.
 - (c) The costs of the application be provided for.
- (2) The application was premised on the grounds that the applicants had received summons for their attendance before the High Court of Kenya at Mombasa in Mombasa High Court criminal case No E029 of 2022 to answer a charge of murder contrary to section 203 as read with section 204 of the Penal Code on the January 25, 2023; and that the charge has no basis at all but is being pushed by the 2nd respondent for extraneous reasons. They contended that they were in the course of discharging their duties, having been deployed to enforce the nationwide curfew when, at about 1920 hours they encountered rowdy members of the public who were rushing home in a bid to comply with the nationwide curfew directive that was then in force. They then heard a loud bang behind them and on checking ascertained that an accident had occurred involving a motorcyclist.
- (3) The applicants averred that they got to learn the following day that the victim had died when his death was reported to Inuka Police Station at around 4.00 p.m. The 1st applicant was the OCS of the Police Station at the time. He accordingly recorded the occurrence and reported the matter to the Director of Criminal Investigations and the 2nd respondent. He was later informed that an inquest would be conducted to ascertain the cause of death. It was therefore a surprising turn of events for them when they received summons to attend the High Court in Mombasa on January 25, 2023 for plea-taking on a charge of murder. They therefore asserted that it would be unreasonable and discriminatory for the respondents to prefer a charge of murder in the circumstances without establishing any nexus between the applicants and the unfortunate death of the deceased.



(4) The application was served on the respondents and when the matter came up for hearing inter partes on April 24, 2023, counsel for the respondents, Ms Anyumba and Ms Kamau, indicated that they were not opposed to leave being granted as prayed.

(5) Needless to say that judicial review proceedings now have a constitutional underpinning such that it is optional for a party to seek leave or not before approaching the court with a substantive application. Hence, in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR by a 5-judge bench of the Court of Appeal held:

“In our considered view presently, judicial review in Kenya has constitutional underpinning in articles 22 and 23 as read with article 47 of the *Constitution* and as operationalized through the provisions of the *Fair Administrative Action Act*. The common law judicial review is now embodied and ensconced into constitutional and statutory judicial review. Order 53 of the Civil Procedure Act and rules is a procedure for applying for remedies under the common law and the *Law Reform Act*. These common law remedies are now part of the constitutional remedies that the High Court can grant under article 23(3)(c) and (f) of the *Constitution*. The fusion of common law judicial review remedies into the constitutional and statutory review remedies imply that Kenya has one and not two mutually exclusive systems for judicial review. A party is at liberty to choose the common law order 53 or constitutional and statutory review procedure. It is not fatal to adopt either or both...We hold that Kenya has one and not two mutually exclusive systems for judicial review. The common law and statutory judicial review are complementary and mutually non-exclusive judicial review approaches.”

(6) In the premises, where a party approaches the court under sections 8 and 9 of the *Law Reform Act*, the court is obliged, in appropriate instances, to ascertain whether the requisite threshold provided for in order 53 of the *Civil Procedure Rules* has been met before granting leave. Hence, in Mombasa HCMCA No 384 of 1996: *Republic v County Council of Kwale & another, Ex Parte Kondo and 57 others* it was held that:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit 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 officers and authorities might be left as to whether they could safely proceed with the administrative action while proceedings for judicial review of it were actually pending even though misconceived...Leave may only be granted therefore if on the material available before the court 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 partes hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially”.

(7) I have consequently looked at the application for leave, the accompanying statutory statement and verifying affidavit sworn by the 1st applicant from the prism of order 53 of the *Civil Procedure Rules* with a view of ascertaining that the applications have complied with the strictures of order 53 rules



1 and 2 of the Civil Procedure Rules. I am accordingly satisfied that the application is compliant; and that it has been brought within the 6 months' period stipulated in rule 2. I am further satisfied that the applicants have an arguable case that is fit for further investigations and therefore are entitled to leave as prayed.

- (8) As to whether leave should operate as stay I have taken into account the position taken by the applicants and I am in agreement that, in the circumstances, it is only fair and just that the impugned decision be stayed pending the hearing and determination of the substantive application. Indeed, in Taib A. Taib v The Minister for Local Government & others Mombasa HCMISCA No 158 of 2006 it was held that:

“ ... 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...”

- (9) In the result, the application dated January 18, 2023 is hereby allowed and orders granted as hereunder:

- (a) that leave be and is hereby granted to the applicants to apply for the following judicial review orders:
- (i) A declaration that the applicants were rightful and dutiful in the discharge of their constitutional mandate on the March 27, 2020 during patrol for enforcement of the Covid-19 nationwide curfew;
 - (ii) A declaration that the applicants did not have any premeditated involvement in the incident that resulted in the death of the deceased;
 - (iii) An order of *certiorari* to bring to the High Court for the purpose of quashing the decision to charge the applicants with the offence of murder and/or further charges in relation to the death of the deceased, namely, Hamisi Juma Idd Khambirwa.
 - (iv) An order of prohibition prohibiting the respondent from interfering in any way with the discharge of the constitutional mandate of the applicants;
- (b) That a substantive application be filed within 21 days from the date hereof.
- (c) That leave so granted does operate as a stay of the decision to charge the applicants with the offence of murder until the determination of the substantive application.
- (d) The costs of the application be costs in the cause.

10 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 4TH DAY OF AUGUST 2023

OLGA SEWE

JUDGE

