



Saka v Inspector General & 3 others; Munyua & another (Interested Parties) (Judicial Review Miscellaneous Application E008 of 2022) [2023] KEHC 22651 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22651 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E008 OF 2022
CM KARIUKI, J
SEPTEMBER 28, 2023**

BETWEEN

RUTH LUFUNGULA SAKA EXPARTE APPLICANT

AND

THE INSPECTOR GENERAL 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION 3RD RESPONDENT

THE DCIO NYANDARUA 4TH RESPONDENT

AND

SAMUEL NJOROGE MUNYUA INTERESTED PARTY

MARY NJERI MBUGUA INTERESTED PARTY

RULING

1. The Applicant herein filed an application by way of a Chamber Summons dated 3rd August 2022, seeking the following orders: -
 - 1) Spent
 - 2) That this honourable court do grant leave to the Applicant herein to commence the judicial review proceedings against the respondent for:
 - 3) That an order of prohibition do issue against or directed at the Respondents, their officers and anybody in authority or person acting for them and interested parties and anybody in acting for them restraining them from arresting, harassing and/or anyway charging the Applicant



over an agreement dated 28th July 2022 and over allegations of conspiracy to defraud the 1st interested party over the Applicant's business transactions with the 2nd interested party.

- 4) That an order of certiorari to remove this honourable court to quash the decision by the Respondents to arrest and charge the exparte Applicant with trumped up charge of conspiracy to defraud over the payments the Applicant received from the 2nd interested party for beauty products and clothes that the Applicant sold to her.
 - 5) That leave so granted operate as a stay of the respondent and the 1st interested party's decision to charge the Applicant on a charge of conspiracy to defraud the 1st interested party and/or Nyonjoro Hardware and Supplies Ltd.
 - 6) That the honourable court be at liberty to make such further orders as any other order as it deems fit to grant for ends of justice to be met.
 - 7) That the costs of this application be provided for.
2. The application is based on the grounds set on the face of it and on the affidavit of Ruth Lufungula Saka and Geoffrey Matekwa and upon such grounds as shall be adduced at the hearing hereof: -
- 1) The exparte Applicant was arrested on 27th July 2022 and taken to Nyahururu where she was admitted to a cash bail of 100,000/- and made to sign an agreement dated 28th July 2022 as a condition for her release from police cells.
 - 2) The Respondents are determined to charge the Applicant with a charge of conspiracy to defraud the 1st interested party and Nyanjoro Hardware and Supplies Ltd over payments for goods and beauty products and clothes supplied to the 2nd interested party.
 - 3) The 2nd interested party has not admitted to stealing a sum of Kshs 1,125,000/- or part thereof from the 1st interested party nor has there been evidence that the payments for value were proceeds of service.
 - 4) The leave to file judicial review application to operate as a stay of arrest and charge the Applicant pending the hearing and determination of the review application.
 - 5) The Applicant's constitutional right to a fair hearing as the Respondents have abused their offices and law.
3. The 1st interested party filed a replying affidavit dated 15th September 2022 by Samuel Njoroge Munyua in opposition to the application. He deponed as follows: -
- 1) That he lodged a genuine case against the 2nd interested party for stealing from Nyonjoro Hardware Supplies Ltd where he is a director.
 - 2) That he 4th respondent moved in to investigate the matter and ultimately the 2nd interested party was charged in Nyahururu Chief Magistrate's Court Criminal Case No. E405 of 2022 with the offence of stealing by servant.
 - 3) That prior to the charging of the 2nd interested party, investigations had revealed that the 2nd interested party had been sending huge amounts of money that was the proceeds of crime to the exparte Applicant who was therefore summoned to record her statement by the 4th respondent concerning his complainant against the 2nd interested party.



- 4) That when it was brought to the attention of the exparte Applicant the charges facing her, the 2nd interested party in consultation with the said advocate, she chose to have the matter resolved outside the police station and court.
 - 5) That the said exparte client's advocate then sought to have the Applicant be released on cash bail to allow negotiations and a possible agreement between the them and which request was honoured by the 4th respondent.
 - 6) That the exparte client was released on cash bail and they proceeded to the 1st interested party's learned counsel to have the agreement deduced in writing and after immense dialogue with the exparte Applicant, she acknowledged having received a total of Kshs. 1,125,000.00/- being proceeds of crime that the 2nd interested arty was facing and committed to pay back the same.
 - 7) That after the said agreement, he took a copy to the 4th respondent and indicated tat he no longer has a complaint against the exparte Applicant in terms of the crime that was the subject of her being summoned.
 - 8) That the instant application is therefore misleading, misplaced and a mere afterthought with the intention of using the back door to challenge the validity of the agreement before a court that lacks the appropriate jurisdiction to entertain such a claim.
 - 9) That the instant application is premature as he has not complained further against the exparte client and there has not been any threat of arrest and prosecution of the exparte client in a criminal case at least no evidence to that end has been adduced.
4. Additionally, the 1st, 2nd and 4th Respondents filed their replying affidavit dated 12th October 2022 sworn by Sgt John Kirui Kiterie, DCI-Nyahururu.

1st, 2nd and 4th Respondents' Submissions

Whether the arrest of the exparte Applicant following her failure to honour the agreement was unlawful or unjustified?

5. The Respondents submitted that following the exparte Applicant's arrest in relation to a complaint lodged by the 1st interested party over stealing by a servant contrary to Section 28 of the Penal Code, she entered into an agreement with the 1st interested party to settle the matter out of court. That the exparte client requested to come back on 15th August 2022 to give the police an update on the progress of the matter but she failed to keep her word. That the matter is still under investigation since other witnesses are yet to record their statements.
6. They asserted that the Applicant's arrest was made after investigations were conducted and the arresting officer believed that there were reasonable grounds for suspecting that the Applicant had committed an offence. There was no situation of false arrest. That there was reasonable suspicion which presupposes the existence of facts or information which would justify an objective observer to consider that the person concerned may have committed the offence.
7. That on basis the basis of the above circumstances as explained by the police officer, it is without doubt that prim facie, the police had and continue to have reasonable suspicion to rearrest the exparte Applicant considering the allegations brought by the 1st interested party on conspiracy to defraud him and failure to honour the agreement dated 28th July 2022.



b. Whether the 1st and 4th respondent acted within their respective mandates in their investigation and preferring criminal charges against the Applicant

8. Reliance was played on George Joshua Okungu & Another v The Chief Magistrates Court, Nairobi & Another [2014] eKLR, Republic v Commissioner of Police and Another Ex Parte Michael Monari & Another [2022] eKLR
9. It was stated that no evidence has been provided to show how prejudicial the investigations carried out against the Applicant were. That the DCI has the mandate to investigate the ex parte Applicant as provided for in Section 35 of the *National Police Service Act*, No. 11 of 2011

c. Whether the ex parte Applicants constitutional right to a fair hearing has been violated as alleged?

10. Reliance was placed on Philomena Mbete Mwilu vs. Director of Public Prosecutions & 3 Others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR, Kenneth Kanyarati & 2 Others v Inspector General of Police Director of Criminal Investigations Department & 2 Others [2015] eKLR
11. The respondent's averred that the Applicant has not provided any proof to this court that the continuing investigations and intended prosecution of the ex parte Applicant has violated her constitutionally guaranteed rights.

d. Whether the instant court in issuing the reliefs sought in the application will prejudice the criminal proceedings already in court?

12. It was stated that the court ought to exercise maximum caution in reaching its verdict lest it prejudices the intended or pending criminal proceedings. It should be alive to the fact that it must not usurp the constitutional and statutory mandate of the Director of Public Prosecutions and neither should it curtail with the investigatory powers of the DCI. Reliance was placed on Republic v Grace Wangari Bunyi (sued as the Administrator of the Estate of the late Obadiah Kuiru Bunyi) & 7 Others Ex parte Moses Kirruti & 28 Others [2018] eKLR
13. Lastly, based on the above analysis, the Respondents submitted that this honourable court should find the judicial review application has no merit and thus should be dismissed with costs awarded to the 1st, 2nd, and 4th Respondents.
14. Ex parte Applicant's submissions & 3rd respondent's submissions were NOT available at the time of drafting this ruling.

Analysis and Determination

15. Having considered the Chamber Summons application dated 3rd August 2022, the respective parties replying affidavits, submissions, and evidence thereto and the applicable law for leave to commence judicial review proceedings, namely Order 53 Rule 1 of the Civil Procedure Rules, the main issue for determination herein is whether the ex parte Applicant should be granted leave to commence judicial review proceedings and the additional orders sought by the ex parte Applicant.
16. The factors to be considered by the court at the leave stage were enumerated in Judicial Review: Principles and Procedure by Jonathan Auburn et al at paragraph 26.05 as follows: -
 - a. whether the enactment, action, decision, or failure to act that is being challenged is amenable to judicial review;



- b. whether the claimant has capacity to bring a claim for judicial review;
 - c. whether the claimant has a sufficient interest to bring a claim for judicial review;
 - d. 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;
 - e. whether the claim is otherwise an abuse of process;
 - f. whether all or some of the grounds of challenge relied upon by the claimant are sufficiently meritorious to justify the grant of permission;
 - g. whether the claim has been brought promptly;
 - h. whether there are any discretionary grounds that justify the refusal of permission in the exercise of the court's discretion.
17. I resonate with the sentiments of the court in *Patel Ravji Lalji & another v Attorney General & 3 others* [2021] eKLR where it was stated as follows: -

“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 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.

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.”

18. Accordingly, in the instant application, the exparte Applicant averred that she was arrested on 27th July 2022 and taken to Nyahururu where she was admitted to a cash bail of 100,000/- and made to sign an agreement dated 28th July 2022, the agreement hereinafter as a condition for her release from the police cells.
19. Through her verifying affidavit dated she averred that her arrest was in connection with the 1st interested party’s complaint against the 2nd interested party for stealing by a servant. That she was introduced to the 2nd interested party sometime in 2021, where she began selling to her beauty and fashion goods and products by sending them as parcels through nuclear public transporters and in return the 2nd respondent would pay her through mpesa.
20. Further, she deponed that she had not met or dealt with the 1st interested party nor did she have any idea how the 1st and 2nd interested parties used to operate in their business. That when she was arrested, she was taken to Nyahururu and processed for court the following day for the alleged offence



- of conspiracy to defraud contrary to Section 217 of the Penal Code. That she was given an option to enter into an agreement with the promise to be released if she promised to pay the 1st interested party Kshs. 1,125,000/-
21. The ex parte Applicant contended that she reluctantly and against her will signed the agreement which agreement was entered by undue influence, duress, through coercion and threat of being charged with theft of Kshs. 12,000,000/-. She stated that she had no chance to verify the allegations that the 2nd interested party had stolen the monies.
 22. She insisted that the 1st, 2nd and 3rd Respondents had violated her constitutional rights by treating her as a suspect over cash payments which she received after she supplied the 2nd respondent with clothes and/or beauty products. That the 2nd interested party is not a party to the agreement and has never acknowledged that the cash she paid her for the supply of clothes and products were proceeds of theft, further the 2nd interested party has not been convicted for the offence that she is charged with to warrant the 1st, 2nd and 3rd Respondents to allege that she conspired with the 2nd respondent to steal from the 1st respondent.
 23. Moreover, she stated that the Respondents and the 1st interested party have abused the law by colluding to have the Applicant sign an agreement as a condition for her release and over a matter that is pending in court and without the approval and/or consent of the 2nd interested party. That the failure by the Respondents to address how she will recover the value of goods and products that she had supplied to the 2nd interested party once she pays the Kshs. 1,125,000/-. That she wrote to the 1st interested party's advocate regarding the same. Further, she reiterated that she was not given a fair hearing in violation of her constitutional right to a fair hearing.
 24. On the other hand, the 1st, 2nd and 4th Respondents through the replying affidavit deposed by Sgt. John Kirui asserted that the 1st interested party made a complaint vide CR NO. 247/43/2022. CF NO. E045/2022 against the 2nd interested party who was a cashier at his business Nyonjoro Hardware.
 25. They stated that the ex parte Applicant was lawfully arrested following investigations on the mpesa account of the suspect by Sgt. John Kirui which uncovered huge transactions between her and the Applicant, transactions which the 1st interested party requested for further investigations to unveil the person involved in the transactions.
 26. That that is when the ex parte client was arrested. The Respondents alleged that the ex parte client's husband produced WhatsApp conversation print out between the suspect and the 2nd interested party showing how they have conspired to defraud the complainant of Kshs. 1,125,000/-. That after interrogations the Applicant and complainant agreed to settle out of court and the Applicant was released on police cash bail of Kshs. 100,000/-
 27. That parties thereafter proceeded to Mathea Gikunju & Company Advocates where they executed the agreement. That the Applicant requested to come back on 15th August 2022 to give an update on the progress of the matter but she did not keep her word.
 28. That the matter is still under investigations since other crucial witnesses are yet to record their statements and granting the orders sought may prejudice the intended or pending criminal proceedings.
 29. Notably, the Court's leave to institute judicial review proceedings is meant for the purposes of identifying, filtering out at an early stage, frivolous and vexatious complaints and ensuring or establishing that the Applicant has in his/her application for leave established a prima facie case. The main reason for the leave as explained by Waki J. (as he then was), in Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996, is to ensure



that an Applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

30. Therefore, whereas Courts will exercise caution not to unduly interfere with, or micromanage the Director of Criminal Investigations proceedings, it is the duty and the obligation of this Court to ensure that they conduct their proceedings in accordance with the Constitution and the law, under its judicial review jurisdiction. The investigative functions of the Director of Criminal Investigations are guaranteed under Article 245 of the Constitution of Kenya as read with section 35 of the National Police Service Act. They are functionally independent and can only take directions to investigate from the Office of the Director of Public Prosecution and no other authority and the Constitution requires that the directive be in writing to give effect.
31. In criminal proceedings the principles for consideration of such applications was aptly captured in the case of Johnson Kamau Njuguna & Another vs Director of Public Prosecutions [2018] eKLR as follows: -
 40. Several principles are applicable as follows; the court is not permitted to delve into the merits or otherwise of a criminal process as that would amount to unnecessary trespassing into the arena specially reserved for the criminal trial and ought not to usurp the constitutional or statutory mandate of the Respondents (R vs CS In Charge of Internal Security & 3 Others Exparte Jean Margiritis Otto supra); the court should not act as if it were the Court of Appeal which would involve going to the merits of the decision itself as to whether or not there was sufficient evidence to support the decision (Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd Civil Appeal No.185 of 2001) even where an Applicant has a seemingly plausible comeback to each of the charges made against him and that they may be persuasive, it is the factual disputes in the case that necessitate a rational actor to conclude that there is sufficient evidence to take the case to trial in a criminal case. (see Patrick Ngunjiri Maina vs DPP & 2 Others [2017] eKLR).
32. Guided by the forgoing it is clear that the exparte Applicant was arrested following investigations relating to the 1st interested party's complaint against the 2nd interested party however the 2nd interested party denied the charges against her. Curiously, it appears that the Applicant entered into an agreement despite the fact that the 2nd interested party had denied the charged against her and the fact that she does not deny that she received monies from the 2nd interested party but her claim which I find to be true at this juncture is that the same was not received with the intention to defraud the 1st interested party but was in payment of the goods that she delivered to the 1st interested party.
33. Furthermore, the presence of transactions between the exparte Applicant and the 2nd respondent in my opinion does not automatically translate to a conspiracy to defraud the 1st respondent. In fact, there was nothing in evidence to indicate such a plot. I question how the exparte Applicant paid cash bail and still entered into the agreement within one day of being arrested.
34. Additionally, despite the exparte Applicant entering into the agreement with she alleges she entered into after undue threats and coercion, 4th respondent appears to still be pursuing charges against her. I would think the effect of the agreement would be to mitigate the same but I will refrain from delving into the same as I would find myself delving into the merits or otherwise of a criminal process which would amount to unnecessary trespassing into the arena specially reserved for the criminal trial.
35. Consequently, upon thorough examination of the exparte Applicant's application and annexures thereto and the applicable law for leave to commence judicial review proceedings and while exercising the necessary caution not to unduly interfere with the DCI's investigative functions, it is my humble opinion that she has established a prima facie case that the Respondents decision-making process



towards preferring any criminal charges and/or intended criminal charge against her was illegal, not fair, irrational and not proportionate in the circumstances. I form the considered view that the matters raised are issues that fit into the purview of judicial review and that the ex parte Applicant has an arguable case.

36. Order 53 Rule 4 of the Civil Procedure Rules provides as follows in the event that additional relief was to be sought in the instant judicial review proceedings by the ex parte Applicant: -

“(1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the Applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.

(3). (3) Every party to the proceedings shall supply to any other party, on demand, copies of the affidavits which he proposes to use at the hearing.”

37. Accordingly, on the additional stay orders sought by the ex parte Applicant, the Court is not precluded from, and may, on the application of any party, make any interlocutory order, including an order for injunctive relief, discovery of documents, interrogatories or cross-examination, and may grant any interim relief as it thinks fit in judicial review proceedings in exercise of its inherent powers and jurisdiction under section 1A and 3A of the *Civil Procedure Act*.

38. This interim or interlocutory order or related relief may be granted by the Court for the following purposes:

1. Preserve or protect the parties' legal position.
2. Facilitate the efficient preparation of the matter for hearing.
3. Ensure effective progress to final hearing and determination of the real issues between the parties.

39. I find that to this extent, the ex parte Applicant's application is properly before this Court as it is seeking stay orders and having examined the submissions and applicable principles of law with respect to the specific interim relief and interlocutory orders sought in the said application, I make a determination that the ex parte Applicant has demonstrated cogent and exceptional reasons why the Respondents should be inhibited from exercising their constitutional and statutory functions.

40. The ex parte Applicant elaborated that the Respondents and the 1st interested party have not responded to her on how she will receive the goods she supplied to the 2nd interested party and further, having granted the leave to commence judicial review proceedings, I opine that not granting the interim injunction orders sought may amount to an irreversible injustice and disruption that the ex parte Applicant may suffer.



41. For the foregoing reasons and findings, I hold that the ex parte Applicant's chamber summons dated 3rd August 2022 is meritorious and is allowed. The same is disposed of in terms of the following orders: -
- i. The ex parte Applicant is granted leave to commence the judicial review proceedings against the respondent in the manner sought.
 - ii. That leave so granted operates as a stay of the respondent and the 1st interested party's decision to charge the Applicant on a charge of conspiracy to defraud the 1st interested party and/or Nyonjoro Hardware and Supplies Ltd pending the hearing and determination of the said judicial review proceedings.

DATED AND DELIVERED IN OLKALOU THIS 28TH DAY OF SEPTEMBER 2023.

.....

CHARLES KARIUKI

JUDGE

