Gathuku v Officer Commanding Station Central Police Station & another (Miscellaneous Application E160 of 2021) [2023] KEHC 22448 (KLR) (Judicial Review) (25 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22448 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION E160 OF 2021

J NGAAH, J

SEPTEMBER 25, 2023

BETWEEN

DOMENICK WAMBUGU GATHUKU .... APPLICANT

AND

OFFICER COMMANDING STATION CENTRAL POLICE STATION .... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS .... 2ND RESPONDENT

RULING

1. The application before court is dated 25 October 2021. The applicant seeks leave to file a substantive motion for the judicial review order of mandamus. The prayer for this order is framed as follows:

   " 2. This Honourable Court be pleased to grant leave to the applicant to institute judicial review proceedings seeking order for mandamus directed to the respondents not to prosecute the case in criminal case no 1432 of 2018 now pending at the Chief Magistrate's Court at Milimani law courts, Nairobi."

2. The applicant also seeks an order directed at the respondents compelling them to terminate Criminal Case no 1432 of 2018 which is pending at the Chief Magistrates Court at Milimani.

3. Contemporaneously filed with application is the statutory statement dated 25 October 2021 and an affidavit sworn on even date by the applicant, apparently, in support of the facts relied upon.

4. According to these documents, the applicant has been charged in criminal case no 1432 of 2018 at Milimani Chief Magistrates Court.

5. The offence or offences for which the applicant has been charged are not clear from his affidavit but it is his case that the facts or the transaction out of which the of criminal case arises is the same transaction that led to his previous prosecution and conviction in criminal case number no 1313 of 2016. In that previous case, he was charged with offences of malicious damage of property contrary to section 339 (1) as read with section 339 (3) (b) of the *Penal Code*, cap 63 and stealing contrary to section 268 as read with section 275 of the *Penal Code*.

6. It is the applicant's position that all the counts and charges against him relate to a land dispute in relation to property he has described as "plot no [partliculars witheld] registered as LR no [partliculars witheld] situated at Kariobangi River Bank within Nairobi City County". The Nairobi City County is the original allottee of the property.

7. Despite the fact that the case was heard and the applicant found guilty and fined ksh 40,000/=, he has been arrested again and charged with fraud over the same subject matter, so it has been alleged.

8. Besides the criminal cases, it is further deposed, the applicant and the complainant in those criminal cases have pending civil suits over the property in issue apparently over title to or ownership of the property. These cases are Nairobi Chief Magistrate's Court Civil Case nos 5426 of 2017 and 1415 of 2018.

9. It is the applicant's contention that the criminal charges against him are an abuse of the court process aimed at intimidating him and meant to influence the outcome of the civil cases in favour of the complainant.

10. Although this is the sort of application that would ordinarily be heard and determined *ex parte*, I directed the applicant to serve it for hearing inter partes for the reason that the case tracking system showed that the application was registered way back in October 2021, yet it was appearing as an application filed under a certificate of urgency on 19 March 2022, almost 6 months later. It is possible that much could have happened in the intervening period that would have a bearing on the orders that this court was likely to make.

11. Nonetheless, none of the respondents filed any response of the application. But I still have to determine the application on its own merits.

12. In an application for leave to file a substantive motion for judicial review orders, a judicial review court would ordinarily be concerned with whether the applicant has made out an arguable case. In other words, whether it is a case which upon further consideration may merit the grant of all or any of the judicial review orders that the applicant is seeking. The leave stage of the proceedings is not meant to determine whether or not the applicant's case will succeed but whether it is arguable.

13. In *IRC v National Federation of Self-Employed and Small Businesses Ltd* (1982) 617, (1981) 2 ALL ER 93) Lord Diplock as explained the need for leave as follows:

> " Its purpose is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."

14. Thus, the purposes identified for leave are one, to save the court's time and, two, so as not to leave public authorities in a state of uncertainty as to whether they can safely proceed with their operations.

15. In the same case, Lord Scarman saw the need for leave as "an essential protection against abuse of legal process." In his words, "It enables the court to prevent abuse by busybodies, cranks and other mischief makers”. (see pages 653 and 113).

16. On his part, Woolf LJ referred to the need for leave, in the same case, as "the unique statutory means by which the court can protect itself against abuse of judicial review."

17. In order to guard against delving into the merits of the case, Lord Diplock, *IRC v National Federation of Self-Employed and Small Businesses Ltd* (*supra*) suggested the following approach.

> “ If, on a quick perusal of the material then available, the court thinks the application discloses what might on further consideration turn out to be an arguable case in favor of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief."

18. Thus, on this basis, the applicant only has to show not that it is, but that it might turn out to be, an arguable case.

19. The applicant wants leave to stop criminal proceedings against him. But the order which he will be seeking, if leave is granted, is the order of mandamus and not certiorari or prohibition. The question is whether the order of mandamus is the appropriate order and whether it would be of any effect if it was to be granted.

20. In order to answer this question, it is necessary to look at the law on these orders of and prohibition, mandamus and certiorari. The law on this subject has been dsicusused in several cases of which *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR is one. In this case the Court of Appeal discussed when these orders can issue.

21. As far as the order of prohibition is concerned the court, citing Halsbury’s Law of England, 4th Edition, Vol.1 at pg.37 paragraph 128, held that:

> “ It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury’s Law of England, 4th Edition, vol 1 at pg.37 paragraph 128.”

22. The court also noted:

> “ ... prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.
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> That was why Mr. Stanley Munga Githunguri was able to get an order prohibiting the Chief Magistrate of Nairobi from trying him when such a trial would amount to an abuse of the process of the Chief Magistrate’s court – See *Stanley Munga Githunguri v Republic*,

Criminal Application no 271 of 1985 (unreported). But if Mr. Githunguri had allowed the Chief Magistrate to try him and a conviction had been recorded, an order prohibition would be ineffectual against the conviction because such an order would not quash the conviction.

The conviction could be quashed either on an appeal or by an order of certiorari. The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition."

23. On the order of mandamus, the court had this to say:

> What is the scope and efficacy of an order of mandamus? Once again we turn to Halsbury's Law of England, 4th Edition Volume 1 at page 111 from paragraph 89. That learned treatise says:-
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>> " "The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."
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>> At paragraph 90 headed "the mandate" it is stated:
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>>> " The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."
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>> What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. We can do no better than give examples. The *Liquor Licensing Act*, Chapter 121 Laws of Kenya, by section 4(1) creates a licensing court for every licensing area and provides that the licensing court, chaired by the District Commissioner of each area, is to consider and determine applications for and the cancellation of liquor licences. Section 8 of the Act provides the manner and procedure to be followed by those who desire to acquire liquor licences. The duty imposed on the licensing court is "to consider and determine applications and the cancellation of licences"-section 4(1) Now, if a party applies for a licence under section 8 and the licensing court simply refuses or neglects to consider and determine the application such a party would be entitled to come and ask the High Court for a mandamus, and if the High Court is satisfied that the licensing

> court has simply refused or neglected to consider and determine the "application" the High Court would be entitled to issue an order of mandamus, compelling the licensing court to consider and determine the application as it is bound by the law to do so. The High Court would, in those circumstances, be compelling, through the remedy of mandamus, the licensing court to perform its public duty imposed on it by section 4(1) of the *Liquor Licensing Act*, and the public duty imposed by that section is the consideration and determination of the application for a licence. The High Court cannot, however, through mandamus, compel the licensing court to either grant or refuse to grant the licence. The power to grant or refuse a licence is vested in the licensing court and unless there is a right of appeal, the High Court cannot itself grant a licence. In fact the Act provides for appeals to the High Court by persons whose licences the licensing court has refused to renew or whose licences have been cancelled."

24. In conclusion on this subject of mandamus, the court noted:

> " ...an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. If the complaint is that the duty has been wrongly performed, i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done."

25. And on the order of certiorari, the court said:

> " Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

26. Taking cue from this decision, it is apparent the order of mandamus would be ill-suited to the applicant's circumstances. A decision to prosecute him has been made and, going by his own admission, his prosecution was underway as at the time of filing this application. Only a quashing order to quash the charges or the decision to charge the applicant and a prohibitory order to prohibit the court in which the applicant has been charged from proceeding with the criminal trial would be the available to the applicant, assuming he was to persuade the court to exercise its discretion in his favour.

27. One other reason why the applicant's application should fail is that the court in which he has been charged has not been joined to the proceedings. Only the court seized of the criminal proceedings can sanction termination of criminal proceedings. This is apparent from Article 157 (8) of the *Constitution* which is to the effect that:

    (8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

28. This being the case, the applicant cannot seek termination of proceedings against him without reference to the court in which he is being prosecuted. The court seized of the criminal case against the applicant and against which the order of prohibition ought to be directed would be a necessary party in proceedings.

29. Apart from the foregoing deficiencies in the applicant's application, I have also observed that the applicant has not specified the grounds of judicial review upon which he seeks relief.

30. It is trite that grounds upon which the application is made or, to be more precise, grounds upon which judicial review reliefs are sought are the only point of entry for a judicial review court to inquire into and check the powers of subordinate courts or tribunals or such other bodies whose powers are subject to judicial review. For this reason, the need to state unambiguously and in specific terms the grounds upon which reliefs for judicial review are sought cannot be overemphasized.

31. Order 53 Rule 1(2) of the *Civil Procedure Rules* states in mandatory terms that the statement accompanying the application must contain, among other things, the grounds upon which the relief is sought or the application is made. It reads as follows:

    (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought,and the grounds on which it is sought, and by affidavits verifying the facts relied on.(Emphasis added).

32. And Order 53 Rule 4(1) states unambiguously that no grounds should be relied upon except those specified in the statement accompanying the application for leave.

33. The grounds to which reference has been made in these provision of the law have not been left to speculation. They were enunciated in the English case of *Council of Civil Service Unions v Minister for the Civil Service* (1985) AC 374,410. In that case, Lord Diplock set out the three heads which he described as "the grounds upon which administrative action is subject to control by judicial review". These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

> " My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
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> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
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> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer,

or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

34. These grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. The court will intervene and grant the remedy for judicial review if any of them is proved to exist. But as Lord Diplock suggested, the list is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds on a case by case basis. It is in this spirit, the learned judge suggested, that the principle of proportionality as a further ground for judicial review has been developed.

35. Since they form the foundation upon which the application for judicial review is based, these grounds must be stated in precise, clear and unambiguous terms in the statement accompanying the application for leave.

36. While reiterating the importance of stating grounds for judicial review in concise and precise terms, Michael Fordham in his book, Judicial Review Handbook, at Paragraph 34.1 states as follows:

" The need to identify and express accurately the possible grounds for judicial review is not simply a matter of analytical nicety. It is one of practical necessity. The provisions of the new order require the accurate identification of (a) potentially applicable grounds and (b) the time at which they arose. Given the frequent presence of multiple targets, the elusive nature of certain grounds, their disarming interrelationship, and the understandable fear of missed opportunity, it is easy to see why public lawyers may feel tempted to 'throw everything' including grounds which are dangerously close to the inconceivable. This approach is unlikely to endear them to the court."

37. The 'new order' referred to in this passage is Order 53 of the Rules of the Supreme Court of England whose provisions are more or less in pari materia with our own Order 53 of the *Civil Procedure Rules, 2010*. The point is, however, clear that courts will not entertain applications where grounds have not been identified and accurately stated. Stating the grounds in precise terms is not, as it were, a matter of analytical nicety but it is a practical necessity.

38. It follows that where the grounds are not stated, the application is fatally defective as, strictly speaking, it has no foundation upon which it is built.

39. Turning back to the applicant's application, it is not apparent from the statement accompanying the application which of the grounds of judicial review the application is based or reliefs sought. What has

been presented as the grounds upon which reliefs are sought are the facts that constitute the applicant's case. This is how the applicant has captured them:

" Grounds relied on is (SIC) that:

a. The applicant was first charged at Makadara Chief Magistrate's Court in Criminal Case no 1313 of 2016 with two counts.

b. Both the applicant and the complainant have filed civil cases at the chief Magistrate's Court at Milimani Commercial Courts raising the same issues in dispute.

c. In all the counts and or charges against the applicant relate (sic) to a land dispute in respect of plot no 277 registered as LR no 12062/959 situated at Kariobangi River Bank within Nairobi, which the original allotttee is Nairobi City County Government.

d. The applicant was arrested and charged at Makadara Chief Magistrate's Court in Criminal Case no 1313 of 2016 with the offence of malicious damage of property contrary to section 339 (1) as read with section 339 (3) (b) of the *Penal Code* and stealing contrary to section 268 as read with section 275 of the *Penal Code* which matter proceeded for full determination wherein the applicant was convicted and fined ksh 40,000.00

e. the applicant was later charged currently again with the same related charges herein at Chief Magistrate's Court at Milimani law courts in criminal case number 1432 of 2018 which he seeks a stay herein.

f. The facts of the matter were that the complainant therein was allegedly constructing on plot no 277 registered as LR no 12062/959 situated at River Bank within Nairobi City County of which he further alleged that the applicant destroyed and stole from his suit property.

g. For these grounds the applicant is amenable to the sanction of this honourable court through an order of mandamus."

40. These cannot be said to be grounds, known in law, upon which judicial review relief is sought. They are, at most, facts from which the applicant's grievances arise.

41. As I have noted, it is not the duty of the court to work out under which head or heads of judicial review these facts would fall. That is the burden which lies squarely on the applicant's shoulder. He has to specify the grounds and also satisfy the court, assuming leave is granted, that the based on the material before court those grounds have been proved to exist.

42. In the absence of the grounds, there will be no basis for prosecution of the substantive suit for judicial review because according to Order 53 Rule 4(1) of the *Civil Procedure Rules*, no grounds should be relied upon except those specified in the statement accompanying the application for leave.

43. Leave is therefore refused and the application dismissed. I make no order as to costs.

44. It is so ordered.

SIGNED, DATED AND DELIVERED ON 25 SEPTEMBER 2023

NGAAH JAIRUS

JUDGE