



**Republic v General; Ndichu (Exparte) (Judicial Review Miscellaneous Application E159 of 2023) [2023] KEHC 26853 (KLR) (Judicial Review) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26853 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E159 OF 2023  
JM CHIGITI, J  
DECEMBER 20, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE HON. ATTORNEY GENERAL ..... RESPONDENT**

**AND**

**ROBERT NDICHU ..... EXPARTE**

**RULING**

1. The applicant via a Notice of Motion dated 17<sup>th</sup> July, 2023 application seeks the following orders:
  1. That this Honourable Court be pleased to grant leave to the applicant to apply for judicial review orders and specifically:- that an order of Mandamus do issue for the purposes of removing into the High Court, the decree in the Chief Magistrates Court CMCC NO. 4355 of 2009 and compelling the respondent herein to satisfy the said decree by way of making payment thereof to the applicant.
  2. That costs be provided for.
2. The Application is predicated in the statutory statement and the verifying affidavit of the applicant.
3. The application is unopposed.

**Brief background:**

4. In the year 2009, the applicant sued the respondent and successfully obtained a judgement and a decree against the respondent on 28<sup>th</sup> September 2012 for Kshs. 1,595,605.00/=.



5. The applicant extracted a certificate of taxation against the government and which was issued on the 8<sup>th</sup> July, 2016.
6. The applicant served the respondent with copy of the judgement, decree and a Certificate of Order against the Government, which elicited no response.
7. The applicant comes to this Honourable Court praying for leave to apply for the judicial review Order of Mandamus.
8. It is not in dispute that the respondent has conveniently avoided making good and/or satisfying such said decree.
9. The applicant suffered both physical and emotional harm due to the incarceration, (false imprisonment and malicious prosecution) out of which his health has sadly deteriorated.
10. The demand for payment has been met with refusal, failure or neglect on the respondents' part.

**Analysis and determination:**

11. The requirement to seek for leave to file for judicial review orders is provided for under Order 53 Rule 1 of the Civil Procedure Rules which stipulates in mandatory terms that no application for an order of mandamus shall be made unless leave therefore has been granted in accordance with the rule.
12. I have considered the Chamber Summons, Verifying Affidavit and Statutory Statement. I have had due regard to the response on record and the learned submissions by counsel. The issue for determination is whether the Application for leave to commence judicial review proceedings is merited.
13. At the leave stage all the applicant has to show not that it is, but that it might turn out to be, an arguable case.
14. In exercise of its discretion, this court has the duty to determine whether or not the Applicant has made out a case that has the potential of fitting into a case that is within the Fair Administrative Action Act framework.
15. The Applicant has to satisfy the court that there is a need to delve deeper into its case so as to establish that the respondent has acted ultra vires, irregularly or through procedural impropriety.
16. An applicant who wants the court to grant them leave so as to advance into the substantive phase of their case must demonstrate that they have a case that falls within the remit of Article 47 of The Constitution.
17. The standards and the burden of proof at the leave stage is not the same as what presents at the substantive hearing phase.
18. All that the court has to do at the leave phase is to carry out an initial assessment of what the applicant has presented before it. No doubt, an applicant who misleads the court and or fails to disclose to the court the truth simply exposes their case to the calamity of a dismissal when the truth comes out at the substantive hearing phase when the real merits of the case is assessed and determined.
19. The applicant at the leave phase owes the court a duty of candid disclosure and presentation of the facts. The days of an applicant who seeks to steal a match ex parte during the leave stage through intentional scheme, ill motive and material non disclosure plants a rotten seed that will kill their case in due course.



20. In *IRC V National Federation of Self-Employed and Small Businesses Ltd* (1982) 617, (1981) 2 ALL ER 93 Lord Diplock 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.”

21. It would therefore appear that the reasons for leave are therefore two-fold and that is number 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.
22. 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).
23. 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’.
24. In order to avoid from delving into the merits of the case, Lord Diplock, in *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.”

25. The question of whether a case is arguable or not may occasionally require a light interrogation of the case’s merits. This type of questioning should not be done in a manner that will determine whether the Applicant will win or fail. The questioning must be very conservative and limited in nature, only going as far as is required to decide whether the matter can be argued, and nothing beyond. It is from this perspective that I have consider the applicant’s application.

#### **Disposition:**

26. 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.”

#### **Orders:**

27. The Application dated 17<sup>th</sup> July, 2023 is allowed.
28. The Applicant shall file and serve the substantive Motion within 14 days of today’s date.
29. The Respondents and interested party shall file and serve their responses if any within 14 days of service.
30. The Applicant shall thereafter file and serve its submissions within 7 days.
31. The Respondents and interested party shall thereafter file and serve their submissions within 7 days of service.
32. The matter shall be mentioned with a view to securing a judgment date.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2023.

.....

J. CHIGITI (SC)

JUDGE

