



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR MISC. APPLICATION NO. E159 OF 2021

REPUBLIC..... APPLICANT

-VERSUS-

THE CHIEF MAGISTRATE

MILIMANI COMMERCIAL COURTS.....1ST RESPONDENT

KENYA RAILWAYS CORPORATION.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

-AND-

FREDRICK BETT.....EX PARTE APPLICANT

RULING

1. The Applicant herein has filed an application by way of a Chamber Summon dated 8th October, 2021 seeking the following **ORDERS:**

A. *THAT this application be certified urgent and heard ex-parte in the first instance.*

B. *THAT by way of Judicial Review, an order of Certiorari do issue, to remove to this Honourable Court and be quashed the 1st Respondent's decision to summarily dismiss the matter without issuance of Notices to show cause to the Applicant and without being heard by the court.*

C. *THAT by way of Judicial Review, an order of mandamus do issue directing the 1st Respondent to reinstate the matter for hearing and the same be heard on merit and the Applicant given an opportunity to be heard.*

D. *THAT by way of Judicial review, an order do issue quashing and removing the orders of Hon Murage given on (sic)*

2. The grounds of the application are stated in the Applicants' statutory statement dated 8th October, 2021 and a verifying affidavit sworn by **Fredrick Bett** on even date. In summary, the main grounds are that the 1st Respondent summarily dismissed Civil Suit No. 6143 of 2008 for want of prosecution without following the substantive law and procedural law on dismissal of suits.

3. The Respondents on the other hand filed Grounds of Opposition dated 6th December, 2021 and written submissions dated 7th February, 2021. They contended that the application as drafted offends Order 53 Rule 1(1) of the Civil Procedure Rules 2010, Article 160(5) of the Constitution, Section 6 of the Judicature Act and Section 9(2)(3) of the Fair Administrative Action Act. In any event, it was contended that the application is an appeal disguised as a judicial review application.

4. In their submissions, counsel for the Respondents argued that the court has pronounced itself on numerous counts on the mandatory nature of the leave stage when applying for judicial review orders under Order 53 of the Civil Procedure Rules and its purpose is to protect the court against abuse of judicial review. Accordingly, failure to apply for leave to file for judicial review under Order 53 is fatal and is a pointer of the Applicant's lack of due diligence. To buttress this argument, counsel cited the cases of **Secretary County Government of Busia v Antaf Company Limited (2021) eKLR**, **JJ Okwaro & Co. Limited v Firearms Licensing Board (2021) eKLR**, **Republic v**

County Council of Kwale & Another Ex Parte Kondo & 57 Others (1998) 1KLR (E&L) and Republic v Kenya Revenue Authority Ex Parte Dennis Joseph Shijenje; National Safety Transport and Safety Authority (Interested Party) (2021) eKLR.

5. Counsel also argued that the application is bad in law, an encroachment on the judicial independence and immunity and the same ought to be dismissed. To that end, counsel cited the Supreme Court in **Bellevue Development Company Limited v Francis Gikonyo & 3 Others (2020) eKLR**, the High Court in **Maina Gitonga v Catherine Nyawira & Another (2015) eKLR** and the US Supreme Court in **Stump v Sparkman (1978) USSC** for the proposition that under the doctrine of judicial immunity, a judicial officer is absolutely immune from criminal or civil suit arising from acts taken within or even in excess of his jurisdiction.

6. It was also submitted that the application offends Section 9(2)(3) of the Fair Administrative Actions Act. To that end counsel cited the cases of **Republic v Kenyatta University Ex Parte Orwa Domnick & 7 Others (2018) eKLR** and **Republic v Firearms Licensing Board & Another Ex parte Stephen Vincent Jobling (2019) eKLR** for the proposition that the Applicant did not exhaust the available remedies and hence the application is ripe for dismissal.

Analysis and Determination

7. I have considered the application dated 8th October, 2021, the reasons offered in support of the urgency, the grounds of opposition and submissions thereto and the question before this court is whether leave ought to have been sought and granted before the applicant could make the substantive application for judicial review as has been done to pursue the remedies of certiorari and mandamus.

8. The applicable law on leave to commence judicial review proceedings is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The reason for the leave was explained by Waki J. (as he then was), in **Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows:

“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 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 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”.

9. It is also trite that in an application for leave, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant’s case is sufficiently meritorious to justify leave. In the present application, the Applicant has filed a chamber summons application seeking judicial review orders instead of one seeking leave to institute judicial review orders.

10. In **Uwe Meixner & another v Attorney General [2005] eKLR**, it was held that the leave of court is a prerequisite to making a substantive application for Judicial Review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of judicial discretion and the test to be applied is whether the applicant has an arguable case. Thus, the first step in the Judicial Review procedure involves the mandatory "leave stage." At this stage an application for leave to bring Judicial Review proceedings must first be made. The leave stage as held by Waki J. (as he then was) is used to identify and filter out, at an early stage, claims which may be trivial or without merit.

11. The advent of the Fair Administrative Actions Act (The FAAA) expanded the scope of reliefs under judicial review. There was no departure, however, from the salient feature of judicial review, which is that, it relates to the court’s power to supervise the exercise of administrative actions by those in authority or in quasi-judicial bodies. It is a special jurisdiction that must be distinguished from petitions to remedy breaches of fundamental rights and freedoms under the constitution or ordinary causes of action under the civil jurisdiction of the court. The FAAA did not provide an alternative procedure of moving the court under judicial review and order 53 of the civil procedure Rules was not repealed. Neither did the FAAA remove the need to sift applications that met the threshold for grant of leave to apply for judicial review orders. Order 53 thus remains the provision governing invocation of judicial review jurisdiction. I am in agreement with the holding of Korir, J in **Felix Kiprono Matagei v Attorney General; Law Society of Kenya (Amicus Curiae) [2021] eKLR** where he was of the view that *“the procedural rules in Order 53 of the CPR governed judicial review prior the promulgation of the Constitution and are still in force as they have not been repealed.”*

12. In HCJR Case No. E087 of 2021, **AAR Insurance vs Public Procurement Administrative Review Board, Secretary IEBC and Zamara Risk and Insurance brokers Limited Interested Parties (unreported)**, Ngaah J aptly summed up the rationale for the requirement for leave where he stated;

“I must reiterate that that judicial review remedies are discretionary and it is partly for this reason that a judicial review court has been clothed with the discretion to interrogate, at a preliminary level, the intended application for prerogative orders. It is at that stage that, in exercise of its discretion, the review court will weigh between ‘the legitimate requirement of public authorities that they should be free to perform their proper functions on behalf of the public and the corresponding requirement that they should have due regard for the legitimate rights and interests of the individual and groups of individuals.’ If upon examination of the material before it, the court is persuaded that a case has been made out that on further interrogation the

legitimate rights and interests of the individual or group of individuals may have been abrogated, it will intervene and exercise its discretion in favour of grant of leave to institute a substantive motion for judicial review reliefs. It follows that the application for leave is not a mere procedural technicality that can be dispensed with at the whims of either the court or an applicant. It is a material stage in the application of judicial review orders at which the discretion of this Honourable court is called into question and which, for this very reason, cannot be taken away without an express provision of the law in that regard.”

13. I have given due consideration to the issues raised in the application herein. I form the considered view that the matters raised are issues that do not fit into the purview of judicial review. The applicant’s grouse is about the dismissal of a case by a Magistrate Court. There exists clear legal provisions and procedure by way of review, setting aside or appeal for an aggrieved party in such circumstance. Thus, even if leave had been sought, the same would not have been available to the applicant.

14. The chamber summons dated 8th October 2021 has sought substantive judicial review reliefs without the applicant seeking leave to institute judicial review proceedings. In view of the foregoing, the application is thus fatally defective for flouting clear statutory provisions. I hereby strike it out with costs to the respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL 2022.

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A. K. NDUNG’U

JUDGE