Galot & another v Commissioner of KRA & 4 others (Judicial Review Miscellaneous Application E119 of 2021) [2022] KEHC 12682 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 12682 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E119 OF 2021

AK NDUNG'U, J

JULY 28, 2022

BETWEEN

MOHAN GALOT & ANOTHER ..... APPLICANT

AND

COMMISSIONER OF KRA & 4 OTHERS ..... RESPONDENT

RULING

1. By way of a chamber summons dated August 4, 2021 Mohan Galot and London Distillers (K) Ltd (hereinafter, the applicants) moved this court for orders:

    a) Spent

    b) The applicants herein be granted leave to apply for an order of *certiorari* to bring before this honourable court the decision by the 3rd respondent contained in the charge sheet dated July 19, 2021 *vide* Criminal Case No E802 of 2021 Republic v Mohan Galot and London Distillers (K) Ltd for the purposes of being quashed.

    c) The applicants be granted leave to apply for an order of prohibition, stopping the 1st respondent from amending or substituting any further charges in the charge sheet dated July 19, 2021 *vide* Criminal Case No E802 of 2021 Republic v Mohan Galot and London Distillers (K) Ltd against the applicants pending the hearing and determination of TAT No 408 of 2021 London Distillers (K) Ltd v The Commissioner of Investigation and Enforcement of the Kenya Revenue Authority before the Tax Appeals Tribunal and the exhaustion of any further subsequent proceedings attendant thereto under the *Tax Procedures Act, 2015*.

d) The applicants be granted leave to apply for an order of prohibition, stopping the 1st respondent from taking any other adverse action against the applicants amounting to enforcement measures on the basis of the assessment notice dated March 18, 2021 and the objection decision dated June 9, 2021 pending the hearing and determination of TAT No 408 of 2021 London Distillers (K) Ltd v The Commissioner of Investigation and Enforcement of the Kenya Revenue Authority before the Tax Appeals Tribunal and the exhaustion of any further subsequent proceedings attendant thereto under the *Tax Procedures Act, 2015*.

e) The leave so granted do operate as a stay of any further proceedings in Criminal Case No E802 of 2021 Republic v Mohan Galot and London Distillers (K) Ltd.

f) Any other order that this honourable court may deem just to grant.

g) Costs

2. The application is premised on a massive thirty-six (36) grounds listed on the face thereof namely:

i. On July 21, 2021 the applicants were arraigned by the 3rd respondent before the 4th respondent in Criminal Case No E802 of 2021 Republic v Mohan Galot and London Distillers (K) Ltd to answer to 18 counts of tax evasion.

ii. The charges arise from an assessment arrived at pursuant to the preliminary investigations carried out by the officers of the 1st respondent and who is the complainant in the said criminal case.

iii. By letter dated September 6, 2020 and as part of the preliminary investigations, the 1st respondent notified the 2nd applicant of its officers' intention to visit its premises for the purposes of physical verification and taking actual stock of the items under dispute.

iv. As at the time of the assessment of the 2nd applicant's alleged tax liability under cover of the letter dated March 18, 2021, the 2nd and 3rd respondent were aware that the 1st respondent had never visited the 2nd applicant's premises as represented for the purposes of physical verification and taking actual stock of the items under dispute as part of its decision making process.

v. At the time of the objection decision dated June 9, 2021 the 1st respondent was aware of the fact that the visit to the 2nd applicant's premises for the purposes of physical verification and taking actual stock of the items under dispute as part of its decision making process had never been conducted.

vi. The decision making process adopted by the 1st respondent and culminating in issuing the 2nd applicant with the tax assessment of alleged tax due before visiting the 2nd applicant's premises for the purposes of the verification of the stock and other disputed items as per its letter dated September 6, 2020 violated the applicants' legitimate expectation that the decision to be made by the 1st respondent would be arrived at after confirmation of practical facts and not on the basis of its whimsical decisions.

vii. As at the time of preferring the impugned criminal charges against the applicants, the 1st to 3rd respondent were aware of the fact that TAT No 408 of 2021 London Distillers (K) Ltd v The Commissioner of Investigation and Enforcement of the Kenya Revenue Authority had already on July 12, 2021 been preferred against the 1st respondents preliminary investigations findings , tax assessment and the subsequent objection decision pursuant to section 52 of the *Tax Procedures Act, 2015* and section 13 of the *Tax Appeals Tribunal Act*

viii. As at the time of the decision to arraign the applicants before the 4th respondent, on the basis of the complaint by the 1st respondent and the investigations by the 2nd Respondent, the 3rd respondent was already aware of the fact that the liability of the 2nd applicant for any alleged taxes had not yet crystallised and therefore no offence relating to tax evasion could be said to have been committed.

ix. As at the time of drawing up the impugned charge sheet dated July 19, 2021, the 3rd respondent was aware of the fact that the 1st applicant was never summoned by the 2nd respondent to record any statement in respect of the said assessment and subsequent objection decision dated June 9, 2021 forming the basis of the applicants prosecution.

x. The officers of the 2nd respondent to proceed to charge the applicants without first recording the applicants' statement on the basis of the 1st respondent's letter dated June 9, 2021 have impeded their rights to be given notice of the nature and reasons for the decision to bring the criminal charges against them and an opportunity to be heard and thereby in contravention of section 4 (3) of The *Fair Administrative Action Act*, No 4 of 2015 as read with article 47 and 50 of the *Constitution*.

xi. As at the time of the arraignment of the applicants, the 3rd respondent was already aware of the applicants' advocates letter dated July 12, 2021 urging him of the undesirability of taking up any intended criminal proceedings on account of the 1st respondents impugned notice of assessment and objection in view of the live and active proceedings before the Tax Appeals Tribunal *vide* TAT No 408 of 2021 London Distillers (K) Ltd v The Commissioner of Investigation and Enforcement of the Kenya Revenue Authority.

xii. As at the time of the drawing up of the impugned charge sheet dated July 19, 2021 and the subsequent arraignment of the applicants on July 21, 2021 to plead to the criminal charges before the 4th respondent , the 3rd respondent was actually aware that the 1st respondent already had an pre-existing forum to prove that the 2nd respondent was actually liable to it for the disputed taxes in the same amount as contested *vide* TAT No 408 of 2021 London Distillers (K) Ltd v The Commissioner of Investigation and Enforcement of the Kenya Revenue Authority which had earlier on been instituted before the Tax Appeals Tribunal on July 12, 2021.

xiii. In the process of drawing up of the impugned charge sheet dated July 19, 2021 and the subsequent arraignment of the applicants on July 21, 2021 to face the criminal charges, the 3rd respondent not only violated the doctrine of

exhaustion of administrative remedies but also infringed the applicants right to a fair trial under article 50 of the *Constitution*.

xiv. In the process of drawing up of the impugned charge sheet dated July 19, 2021, the 3rd respondent actually knew that both the prosecution and the applicants would be relying on the same documents which have already been produced before the live proceedings before the Tax Appeals Tribunal *vide* TAT No 408 of 2021 London Distillers (K) Ltd v The Commissioner of Investigation and Enforcement of the Kenya Revenue Authority.

xv. the aggregate actions of the 1st to 3rd respondent was not only unwarranted but equally against the spirit, intention, meaning purport and effect of the *Constitution* and all other relevant laws.

xvi. The respondents actions have contravened section 5(1) and (2) of the *Kenya Revenue Authority Act* No 2 of 1995 which requires the 1st respondent together with all its authorised officers seconded to it by the 2nd and 3rd respondents in the performance of its functions and administration of tax law to strictly adhere to the law.

xvii. The 2nd respondent's officers have equally contravened section 49 of the *National Police Service Act* No 11A of 2011 which requires a police officer in the performance of his duties and exercise of his powers to do so in a manner that is lawful, must respect the law and to the best of his capability, prevent and oppose any violations of them.

xviii. For the proper administration of justice, it is undesirable and waste of judicial time for parallel proceedings based on the same facts to be allowed to continue as there must be certainty in the determination of issues which is not therefore possible in such circumstances where even the 2nd applicant's liability has not even crystallised.

xix. Section 80 (1) of the *Tax Appeals Tribunal Act* provides that a person shall not be subject to both the imposition of a penalty and the prosecution of an offence in respect of the same act or omission in relation to a tax law.

xx. This court in *Rana Auto Selection Limited & 2 others v Kenya Revenue Authority & another* [2021] eKLR held that taxes in dispute under section 52(2) of the *Tax Procedures Act* are not taxes due and recoverable until the determination of the appeal and therefore any prosecution based on taxes in dispute is an illegality and further that the respondent's decision to prosecute deliberately undermined the jurisdiction of the Tax Appeals Tribunal which is seized of appeals over the said tax objection decisions and an infringement of article 47 of the *Constitution*.

xxi. The 1st to 3rd respondents are in the circumstances actuated by a desire to oppress the applicants into acceding to demands by brandishing the sword of punishment under the criminal justice system and which is not a desire to punish on behalf of the public a crime that has actually not been committed and have not exercised their power to investigate and prosecute responsibly and in accordance with the law and in good faith as held in *Republic v Chief Magistrates Court at Mombasa ex parte Ganijee & another* [2002] eKLR.

xxii. In making the decision to institute the criminal proceedings , the 3rd respondent merely rubberstamped the decisions of the 1st and 2nd respondents so as to have the applicants charged when they had already been informed of the institution of the active proceedings before the interested party and have therefore breached his duties under article 157 (1) of the *Constitution* which requires him to always act judiciously and not in perpetuation of an unfair and malicious criminal complaint as was held in *Cyrus SK Jirongo v Soy Developers Ltd & 9 others* [2021] eKLR.

xxiii. In view of the decision in *Cyrus SK Jirongo v Soy Developers Ltd & 9 others* [2021] eKLR , the 1st respondent has demonstrated that it was actuated by malice , ill-will and ulterior motives merely for the sole purposes of settling scores with the applicants on account of the pending proceedings before the Tax Appeals Tribunal *vide* TAT No 542 of 2020 Tax Watch Africa & London Distillers (K) Ltd v The Commissioner General Kenya Revenue Authority , where it has failed to controverted evidence to the effect that its officers are colluding with other players in the industry to evade tax through the use of fake and counterfeit excise stamps.

xxiv. The criminal charges against the applicants have been mounted for collateral purposes so as to aid proof of matters before the Tax Appeals Tribunal by forcing the applicant's hands to compromise the said proceedings *vide* TAT No 408 of 2021 London Distillers (K) Ltd v The Commissioner of Investigation and Enforcement of the Kenya Revenue Authority.

xxv. There must be justifiable belief that actually a crime known in law has actually been committed before commencement of criminal prosecutions as criminal prosecutions should not be commenced at the instance, control and supervision of a party, unlike in the instant circumstances.

xxvi. The 3rd respondent has by his conduct ignored his primary duty of ensuring that the right to a fair trial cannot be limited thus raising the bar in the determination of the question on whether or not to prosecute by not making whimsical decisions and in violation of articles 50(1) and 157(1) of the *Constitution*.

xxvii. The arraignment of the applicants before the 4th respondent was already premeditated even before the final assessment was now done on March 18, 2021 and the subsequent objection decision on June 9, 2021.

xxviii. To the extent that article 157 of the *Constitution* commands the 3rd respondent to ensure that the need to prevent and avoid abuse of the legal process through the criminal justice system is ensured, this honourable court has the jurisdiction to stop any process of prosecution that can lead to abuse of power.

xxix. This honourable court has the jurisdiction and powers to interrogate any question as to whether on the basis of the investigations by the 2nd respondent , the impugned decision by the 3rd respondent to prosecute the applicants before the 4th respondent is consistent with article 157 of the *Constitution* , and where these expectations have not been met as in the instant

case , terminate the proceedings so as to secure the ends of justice and restrain the abuse of its processes that may lead to harassment and persecution as was held in *Cyrus SK Jirongo v Soy Developers Ltd & 9 others* [2021] eKLR.

xxx. This honourable court is empowered by section 7(1) of the *Fair Administrative Action Act*, No 4 of 2015 to review an administrative action or decision, if the person who has made the decision has acted in excess of jurisdiction or power conferred to him under any written law and has been reasonably suspected of bias having denied us the persons to whom the administrative action or decision relates, a reasonable opportunity to state their case.

xxxi. If the impugned decision is not stayed, then it would be establishing a dangerous precedent of taxpayers being forced to operate in fear of asserting their rights as provided for under the law in the event of violations by the 1st to 3rd respondents to have the applicants prosecuted in parallel proceedings for criminal charges, notwithstanding the express provisions of the law under section 52 of the *Tax Procedures Act* and section 13 of the *Tax Appeals Tribunal Act* to challenge its decisions.

xxxii. The decision making process culminating in the action of putting the applicants through a trial where they will be faced with 18 counts of the same offence will highly prejudice their constitutional right to a fair trial and is therefore unreasonable, ill motivated as was held in *Peter Ochieng v Republic* [1985] *eKLR*.

xxxiii. The actions of the respondents culminating in our arraignment in court under the full coverage of the media has caused the applicants wide embarrassment and prejudice in the circumstances.

3. The said grounds are rehearsed in the statutory statement and Mohan Galot has sworn a supporting affidavit attaching various exhibits.

4. In a nutshell, the gist of the applicant's case is that they were both arraigned before the 4th respondent *vide* Criminal Case No E802 of 2021, Republic v Mohan Galot and London Distillers (K) Ltd wherein they were charged with 18 counts of tax evasion.

5. It is the applicant's case that the charges were preferred notwithstanding the pendency of an appeal in TAT No 408 of 2021, London Distillers (K) Ltd v the Commissioner of Investigation and Enforcement of the Kenya Revenue Authority which is an appeal against the tax assessment by the 1st respondent contained in the 1st respondent's letter dated June 9, 2021.

6. It is contended that the applicants are aware of the 1st respondent's ta affairs for the years 2015 up to 2019 and the applicants duly instructed their tax consultants, Ms Sirro and Partners Ltd to engage with the officers of the 1st respondent. Evidence of such engagement is provided vide a copy of a letter dated September 6, 2020 by the 1st respondent requesting to visit the applicants' premises to physically verify and take actual stocks of the items subject of the investigations.

7. The applicants' case is that at all material time the 1st applicant was never aware of the existence of investigations on tax evasion against the 2nd applicant which claim was laid through a letter dated March 2, 2021 from the National Police Service summoning the directors of the 2nd applicant to appear before

one Peter M Kiboro, an officer from Directorate of Criminal Investigations seconded to the Kenya Revenue Authority, to provide information while recording statements on a case of tax evasion.

8. Subsequently to the summons, the applications sought through their advocates details of the allegations of tax evasion to enable them responded, a request that was not acceded to. It is the applicants' case that the refusal to furnish the 2nd applicant with details of the investigations was not only unwarranted but went against the spirit, intention, meaning and purport of the *Fair Administrative Action Act* which operation arises article 47 of the *Constitution*.

9. The applicants' maintains that the investigations by the 1st respondent which were to include a visit by them to the 2nd applicant's premises were not complete thus there was no reconciliation of the contested positions and therefore the issue of tax evasion could not have arisen. Despite this and without visiting the 2nd applicant's distillery for purposes of verification of the facts and stocks, the 1st respondent proceeded to issue to the 2nd applicant the assessment of tax liability vide the letter dated June 9, 2021.

10. The assessment was met with an objection from the applicants' tax consultants and upon an objection decision, an appeal was instituted before the Tax Appeals Tribunal. It is urged that the documents lodged in court for use in the criminal proceedings are exactly the same documents already filed by the 2nd applicant in the proceedings before the Tax Appeals Tribunal.

11. The applicants maintain that right to be heard has been infringed. They were not given notice of the nature and reasons for the decision to bring the criminal charges against them thereby flouting section 4(3) of the *Fair Administrative Action Act*. It is urged that the failure to visit the 2nd applicant's premises for purposes of verification of the stock and other disputed items as per the letter dated September 6, 2020 violated the applicant's legitimate expectation that the decision to be made by the 1st respondent would be arrived at after confirmation of facts and not whimsically.

12. It is urged that the amounts forming the basis of the charges based on the objection decision are subject of determination in TAT 408 of 2021, London Distillers (K) Ltd v Commissioner of Investigation and enforcement, Kenya Revenue Authority. The decision to have the applicants charged is thus irrational, unfair, biased and unreasonable. The respondents are accused of flouting the *Fair Administrative Action Act*, the *Kenya Revenue Authority Act* and the *National Police Service Act*.

13. A serious allegation is made that the criminal charges are actuated by malice arising from the applicants have pending proceedings against the Kenya Revenue Authority in TAT 542 of 2020, Tax Watch Africa & London Distillers (K) Ltd v the Commissioner General Kenya Revenue Authority where the applicants allege to have placed uncontroverted evidence of collusion between the 1st respondent's officers and other industry players to evade tax.

14. The application is opposed. Eugene Wanende has sworn a replying affidavit setting out the 1st respondent's case. He states that an increase in deposits in the applicant's' bank accounts between January 2019 and August 2019 triggered an investigation to establish their tax compliance.

15. Using various tests and methods, the 1st respondent established that the applicants have a tax liability of Kshs 2,681,871,986 being corporation tax, excise duty and VAT due. This result of the preliminary investigations was shared with the applicants vide a letter dated July 3, 2020 giving the applicants an opportunity to explain the discrepancies noted in their tax returns and the existence of tax liability.

16. It is urged that the parties engaged through several correspondences and a visit to the applicants' premises which engagement resulted in a reviewed tax assessment of Kshs 2,055,304,414 communicated to the applicants' through a letter dated March 18, 2021. This led to an objection lodged by the applicants but which was dismissed in the objection decision dated June 9, 2021.

17. Eugene acknowledges the existence of an appeal against the objection decision to the Tax Appeals Tribunal in Nairobi TAT 408 of 2021. It is urged however that a tax is due and owning on the date the return must be filed even if ascertainment of the amount requires reference to a subsequent determination by another party as the tax assessment merely reminds a tax payer to the duty to pay a tax debt already due and does not create that liability.

18. It is contended that the appeal before the Tax Appeals Tribunal is civil in nature and does not address the criminal aspects of the case. This is explained in that other than establishing the tax liability shown above, the 1st respondent further found that the 2nd applicant had committed several offences under the *Tax Procedures Act*.

19. The 1st respondent maintains that the tax due has crystalized and that the charge sheet comprehensively addresses the omissions and commissions that constitute the criminal charges filed.

20. The application for judicial review orders is said to be premature and an abuse of the court process for reasons that there is no disclosed threat to violate their constitutional rights and freedom to warrant grant of stay/prohibitory orders. It is averred that the applicants shall have the opportunity to defend themselves, cross examine witnesses and adduce evidence in support of their case. The 1st respondent contends that the effects of the orders and reliefs sought by the applicants would amount to exonerating them from the criminal charges without a trial.

21. The 3rd respondent opposed the application through the affidavit of Naomi Isoe. She depones that the 3rd respondent reviewed the inquiry file submitted by the 1st respondent in order to ascertain the sufficiency or otherwise of the evidence gathered therein. This was in exercise of powers donated to the office under article 157 of the *Constitution*. The 3rd respondent required some areas to be covered and upon return of the file after further investigations, a review showed sufficient evidence to sustain the proposed charges and the 3rd respondent directed that the applicants be charged.

22. It is urged that the present application seeks to curtail the present application seeks to curtail the prosecutorial powers donated under article 157 and that the matter before the Tax Tribunal is not a bar to prosecution of the applicants. It is averred that both civil and criminal charges can run concurrently by dint of section 193 of the *Criminal Procedure Code*.

23. It is urged that the applicants were all along aware of the investigations and that the accuracy or correctness of the allegations by the applicants can only be tested by the trail court. It is denied that the applicants were condemned unheard.

24. The court is notified that the applicants have also filed an application before the Chief Magistrates Court in which they seek similar orders of stay of proceedings which is a waste of the court's time and a gamble chancing for a favourable determination.

25. The court is urged to exercise extreme case and caution not to interfere with the constitutional powers of the 3rd respondent and the court is implored to interfere with the independence of the 3rd respondent only when the exercise of power is unconstitutional, is in bad faith or amounts to abuse of the process.

26. The 2nd, 4th, 5th and 6th respondents have not filed responses to the application.

27. The application was canvassed by way of written submissions pursuant to directions of court made on October 12, 2021. The applicants' submissions are dated November 8, 2021. The 1st respondents submissions are dated ..... The 3rd respondent's submissions are dated November 3, 2021.

28. I have had occasion to consider to the chamber summons application, the statutory statement and affidavit in support. I have considered the replying affidavits on record. I have had due regard to the learned submissions by counsel. At this stage of the proceedings and arising from the material before me, two (2) issues crystalize for determination:

    1. Whether the applicants have established sufficient grounds for grant of leave to institute judicial review proceedings.

    2. Whether the applicants have achieved the legal threshold for the grant of order that the leave sought, if granted, operates as a stay of any further proceedings in Criminal Case No E802 of 2021, Republic v Mohan Galot and London Distillers (K) Ltd.

The Applicable Legal Principles

29. Judicial review as a remedy, hitherto a preserve of application under the structures of the *Law Reform Act*, is now a constitutionally embedded remedy as espoused in articles 22 and 23 of the *Constitution* for enforcement of fundamental rights and freedoms and has constitutional underpinning in article 47 which is operationalised under the *Fair administrative Action Act* No 4 of 2015. The procedure applicable in instituting judicial review applications is still governed by the provisions of order 53 of the *Civil Procedure Rules*. (The rules envisaged under the *Fair Administrative Action Act* are yet to be formulated and in any event order 53 was not repealed by the enactment of the *FAAA*).

30. Order 53 of the *Civil Procedure Rules* provides as follows: -

> " 1.
>
> (1) No application for an order of *mandamus*, prohibition or *certiorari* shall be made unless leave therefore has been granted in accordance with this rule.
>
> (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."

31. Waki, J (as he then was) eloquently elucidated the purpose of leave in judicial review proceedings in R*epublic v county Council of Kwale & another Exparte Kondo & 57 others* Mombasa HC MCA No 384/1996,where he stated;

> " the purpose for 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 complainants 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 parties 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."

32. In the case of *Patel Ravji Lalji & another v Attorney General & 3 others* [2021] eKLR, the court held as follows: -

> "While in most cases it is self-evident that the matter should proceed to judicial review, there are a number of preliminary factors that a court considers and addresses at the leave stage. These factors have been enumerated in Judicial Review: Principles and Procedure by Jonathan Auburn *et al* at paragraph 26.05 as follows:
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> 1) Whether the enactment, action, decision, or failure to act that is being challenged is amenable to judicial review;
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> 2) Whether the claimant has capacity to bring a claim for judicial review;
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> 3) Whether the claimant has a sufficient interest to bring a claim for judicial review;
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> 4) 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;
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> 5) Whether the claim is otherwise an abuse of process;
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> 6) Whether all or some of the grounds of challenge relied upon by the claimant are sufficiently meritorious to justify the grant of permission;
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> 7) Whether the claim has been brought promptly;
>
> 8) Whether there are any discretionary grounds that justify the refusal of permission in the exercise of the court's discretion".
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> Further the same court held that: -
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> > "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 v 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".

33. The preceding literature clearly demonstrates that the grant of leave to institute judicial review proceedings is neither a mechanical exercise nor a mere formality or a practice of magic. Leave is not to be granted as a matter of course. It is upon the applicant to demonstrate to the court that he or she has a *prima facie* case which is available for grant of leave.

34. At this stage the applicant is not expected to prove his case to any degree and as such is not to ventilate his case going into the depths of the merits of the case but he must show that the proceedings are not statute barred and that he should be granted an opportunity to be heard at the substantive stage.

35. In the instant case, the facts disclose an investigation over tax compliance on the part of the applicants by the 1st respondent which culminated in the 1st respondent issuing a tax assessment notice dated March 18, 2021. The applicants raised an objection to the said notice through their tax consultants, Sirro and Partners Ltd. The objection was determined by the 1st respondent *vide* its objection decision dated June 9, 2021. The applicants exercised their right of appeal and lodged an appeal before the Tax Appeals Tribunal, being TAT 408 of 2021 London Distillers K Ltd v The Commissioner of Investigation and Enforcement of The Kenya Revenue Authority.

36. It is the 1st respondent's case that in the course of investigations cognisable tax offences were disclosed leading to the now impugned charges. On the flip side of the coin the applicants maintain that the investigations were incomplete and that the pendency of the appeal at the Tax Appeals Tribunal renders the decision to charge them irrational, unfair, biased and unreasonable. The applicants also raise an issue of an alleged grudge over pending proceedings in TAT No 542 of 2020 Tax Watch Africa and London Distillers Kenya Ltd v The Commissioner General Kenya Revenue Authority in which the applicants have laid alleged uncontroverted evidence of collusion by the Authority's officers with other industry players to evade tax.

37. The 3rd respondents unfettered constitutional power to institute criminal proceedings without direction from any person or consent from any person or authority is strenuously defended in the replying affidavit and in submissions.

38. No doubt that both sides have gone to great lengths and raised substantial issues to prove why the process was wrought with impropriety, on the one hand, or that the process was free from any impropriety on the other hand. Admittedly, the line between establishing an arguable case and a foray into merit considerations is a thin one and parties invariably will often stray into the realm of merit arguments as has happened in these proceedings.

39. A lot of the facts and very able arguments proffered in the respective submissions are certainly good fodder for use at a substantive hearing. At this stage and from the disclosed facts am satisfied that the applicants have demonstrated sufficient interest in the matter (they are the accused persons in the impugned trial) and secondly, the substance of the passionate rival arguments both in facts and in law certainly lay a solid foundation for a contest at a substantive hearing. An arguable case is established. As stated earlier, this is not the place and time to delve into the propriety or otherwise of the process under challenge. That opportunity will present at the substantive hearing.

40. In so finding, am guided by the court's decision in *Re Bivac International SA (Bureau Veritas)* [2005] 2 EA 43 (HCK), it stated:

> " Application for leave to apply for orders of judicial review are normally ex parte and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the court's discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved."

41. This position was appreciated by Majanja, J in Judicial Review Misc Civil Appl No 139 of 2014 between *Vania Investments Pool Limited and Capital Markets Authority & others* in which the learned judge expressed himself as follows:

> "I do not read the Court of Appeal to be saying that the court should not have regard the facts of the case or have at best a cursory glance at the arguments. As I stated in Oceanfreight Transport Company Ltd v Purity Gathoni and another Nairobi HC Misc Appl JR No 249 of 2011 [2014] eKLR,
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> > "In my view, the reference to an "arguable case" in W'Njuguna's Case is not that the issue is arguable merely because one party asserts one position and the other takes a contrary view." The duty of the court to consider the facts is not lessened by the mere conclusion that the case is frivolous, or that leave is underserved by examining the facts...Indeed, if leave was to be considered a matter of right then the purpose for which leave is required would be rendered otiose."

Enough said on the question whether leave should be granted.

Whether The Leave Granted Should Operate As A Stay Of Any Further Proceedings In Criminal Case No E802 Of 2021 Republic V Mohan Galot And London Distillers (k) Ltd

42. Order 53 Rule 1(4) of the *Civil Procedure Rules* provides:

> "The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise."

In essence, the rule gives a discretionary power to the court to stay the implementation of the impugned decision, administrative action or proceedings as the case may be pending the determination of the judicial review application.

43. I hasten to add that, in my view, the consideration of whether to grant a stay or not where purely judicial proceedings (and especially criminal proceedings are concerned) assumes a more circumspect and rigorous interrogation in that, as it were, it's a delicate balancing act involving considerations of the rights of an applicant and the right of the public through the Director of Public Prosecutions to have criminal trials expedited and at the same time putting into account the need to allow constitutionally established courts of law to carry out their mandate.

44. The court in *Republic v Attorney General& 4 others Ex Parte Kenneth Kariuki Githii* [2014] eKLR stated;

> "The court ought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process,

the court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore, the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration. See R v Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763 and Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)."

45. The applicable principles governing granting of an order that leave granted to institute judicial proceedings operates as a stay of the impugned decision, administrative action or proceedings are now well established in case law. The purpose of stay was restated by Dyson, LJ in *R v Ashworth Hospital Authority* [2003] WLR 127 at 138 where the judge stated as follows;

> " The purpose of a stay in a judicial review is clear. It is to suspend the 'proceedings' that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In Avon, Glidewell, LJ said that the phrase "stay of proceedings" must be given wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. A narrow interpretation, such as that which appealed to the Privy Council in Vehicle and Supplies, would appear to deny jurisdiction even in case A. That would indeed be regrettable and, if correct, would expose a serious shortcoming in the armoury of powers available to the court when granting permission to apply for judicial review...Thus it is common ground that "proceedings" includes not only the process leading up to the making of the decision but the decision itself. The administrative court routinely grants a stay to prevent the implementation of a decision that has been made but not yet carried into effect, or fully carried into effect." (See also Maraga, J (as he then was) in Taib A. Taib v The Minister for Local Government & Others Mombasa HCMISCA No 158 of 2006)

46. I agree with Odunga, J in the decision in *Republic v National Assembly & another Ex-parte Coalition for Reform and Democracy (CORD)* [2016] eKLR where he stated;

> " In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review proceedings nugatory or an academic exercise that the court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding..... Therefore, it is not in every case that there are chances of the High Court reaching a decision contrary to the one in the proceedings sought to be stayed that the High Court will stay those proceedings. It must be shown that the probability, rather than the possibility, of a determination being made in the challenged proceedings, is high and that the same would render the judicial review proceedings futile that the stay ought to be granted. It follows that the stage at which the said proceedings under challenge have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor."

47. In the instant suit the charges have been preferred. The envisaged stay sought is to stay the proceedings at the stage where they are. Strictly speaking, and this court has stated as much before, a trial is not a one off event that will happen in a flash, be heard, a conviction be made and penal consequences to follow. Am also alive to the provisions of section193 of the Criminal Procedure code that provides that subsisting civil proceedings can run concurrently with criminal proceedings. On the other hand, the proceedings herein would not be rendered nugatory since the court wields the powers to quash any orders that may emanate from the trial court should that be found necessary. The applicants too have the legal leeway to have recourse to this court should there be imminent danger of penal consequences should, in the very unlikely event, the criminal trial conclude before these proceedings. Again, should the respondents proceed with what might be ultimately found to be a malicious prosecution, the applicants are not bereft of a legal remedy. Given these relevant factors, the stay of a criminal trial should ordinarily issue after the judicial review application is heard to determine the propriety of the charges. This is within the background of deference to the 3rd respondent constitutional powers to undertake criminal prosecutions without consent or direction from any person or authority. That said, the power to grant stay is discretionary and the court will exercise such discretion judiciously based on circumstances of each case.

48. The instant application and the subject trial involve tax matters that are before the CM'S Court and at the Tax Appeals Tribunal. The trial at the trial court has not taken off even though plea has been taken. I figure that the trial would be a lengthy laborious exercise of sifting through documents and legal arguments. This judicial review application would be determined in a maximum 3 months. It is my considered view that a stay of proceedings at the Chief Magistrates Court would serve the interests of justice for all the parties. It is thus apt for this court to exercise its discretion in favour of the applicants and grant a stay with a rider that the judicial review application shall be expedited.

49. Consequently, and for reasons above stated, I allow the chamber summons application dated August 4, 2021 and make the following orders;

    1) Leave to institute judicial review proceedings is allowed in terms of prayers (b), (c) and (d).

    2) The leave so granted do operate as a stay of in terms of prayer (e).

    3) The substantive motion be filed and served within 7 days hereof.

    4) Responses be filed and served within 14 days of service.

    5) Leave for a supplementary affidavit if desired is granted within 7 days of service of responses.

    6) The substantive motion shall be disposed of by way of written submissions.

    7) The applicant to file submissions with 14 days of closure of affidavits and the respondents and interested party within 14 days of service of rival submissions.

    8) Mention on October 3, 2022.

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

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AK NDUNGU

JUDGE