



**Amos v Director of Public Prosecutions & 2 others (Application E059 of 2021)
[2022] KEHC 18088 (KLR) (Judicial Review) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 18088 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E059 OF 2021
J NGAAH, J
OCTOBER 28, 2022**

BETWEEN

DUNCAN NDEGWA AMOS APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

RULING

- 1 The application before court is a chamber summons dated June 6, 2022. It has been filed under Order 53 Rule 1(1) (2) (3) and (4) of the [Civil Procedure Rules](#).
- 2 The applicant seeks leave to file a motion for the order of *mandamus* and the prayers for the leave have been framed as follows:

“(2) That leave be granted to the applicant to apply for an order of mandamus to compel the respondents release the outcome of the investigations (if any) conducted pursuant to a complaint made by the Applicant to the 3rd respondent on April 1, 2014 Vide OB REF: N CID/GEN/COMP/6/11/2014 regarding fraudulent directorship of Muvir Holdings Ltd whereby the applicant was removed as a director thereof and other strangers added as shareholders/directors thereof.

(3) That leave be granted to the applicant to apply for orders of mandamus to compel the 1st respondent to institute criminal charges against perpetrators



of the fraudulent removal of the applicant as a shareholder/director of Muvir Holdings Limited or otherwise provide this honourable court and the applicant with the reasons as to why such a prosecution could not be undertaken.”

- 3 The verifying affidavit sworn by Duncan Ndegwa Amos on April 13, 2022 in support of the summons is to the effect that the deponent is one of the directors and promoters of Muvir Holdings Company Limited alongside Francis Mburu Kimani, Rosemary Muthoni Mwangi and James Nyarunda Ombati. Other directors or promoters have been named as Victor Wachira Muriuki, S.J Richard Olang and Carol Muthoni Mutuanjau.
- 4 The deponent alleges that their names were fraudulently removed from the list of shareholders/directors and replaced with the names of James Irura Kanyamba and Joseph Wachira Mugweru.
- 5 The deponent reported what he thought was fraud to the 3rd respondent in 2014 but when he pursued the matter further, he was advised that a forensic audit had been conducted. He never received any results of the audit though. He also learnt that the 3rd respondent forwarded the investigations or inquiry file to the 1st respondent but no action was taken by the 1st respondent in prosecuting those the applicant had complained about.
- 6 It has also been deposed that one of the properties of Muvir Holdings Company Limited was sold illegally to Engen Kenya Limited and that this sale gave rise to High Court Civil Suit No. 248 of 2016. This suit has been concluded and a decree issued in favour of the company. The applicant fears that the decree will be settled and funds distributed amongst the existing shareholders to his exclusion and detriment.
- 7 The 1st respondent opposed the application and to that end filed grounds of objection dated 20 June 2022 in which he contended that the application is misconceived, frivolous and premature and, in any event, an abuse of the court process. The 2nd and 3rd respondents did not respond to the application.
- 8 I have considered the application the response thereto and the written submissions by the respective parties.
- 9 I must start by saying that, at this stage of the proceedings, all that I would be concerned with is whether the applicant has made out an arguable case; in other words, whether it is a case which upon consideration may merit the grant of the judicial review order of mandamus. 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. Lord Diplock was of this opinion in *IRC V National Federation of Self-Employed and Small Businesses Ltd* (1982) 617, (1981) 2 ALL ER 93) where he 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.”
- 10 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.

Prayer 2 of the chamber summons can quickly be disposed of.



Article 157(6) (a) of *the Constitution* gives the Director of Public Prosecutions not only the power to prosecute but also the discretion to institute criminal proceedings; it states as follows:

- (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
 - (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed; (Emphasis added).

11 It is obvious from this provision of the *Constitution* that there is an element of discretion in exercise of the powers of prosecution by the 1st respondent.

12 It is trite that a judicial review court will be hesitant to intervene and interfere with the exercise of the discretion unless it can be demonstrated that the discretion was exercised whimsically or capriciously rather than judiciously. The court emphasised this point in *Chief Constable of the North West Police vs Evans* (1982) 3 ALL ER 141 where it was stated as follows:

“The remedy by way of judicial review under RSC...is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and ...administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner...and not to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law.” (Per Lord Hailsham at 1160E-H).”

13 Similar observations were made by Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan BC* [1976] 3 All ER 665 at 695, [1977] AC 1014 at 1064 where he noted:

“The very concept of administrative discretion involves a right to choose between more than one possible course of action on which there is room for reasonable people to hold differing opinions as to which is to be preferred.”

14 Courts may intervene to review a power conferred by statute on the ground of unfairness but only if the unfairness in the purported exercise of the power be such as to amount to an abuse of the power. See *Preston v IRC* [1985] 2 All ER 327, [1985] AC 835, per Lord Templeman.

15 It has not been demonstrated that in opting not to prosecute those persons the applicant complained about, the 1st respondent did not exercise his discretion appropriately or that he abused his powers of prosecution.

16 It must also be remembered that mandamus enforces duties and not powers although in certain instances a power may be coupled with a duty so that the donee of power would be obliged to exercise it. (See *Foulkes Administrative Law*, 7th Edition at page 368).

17 Again as in specific performance, the court will not allow mandamus if the form of the order requires day-to-day supervision. (See *Foulkes Administrative Law* (ibid) at page 371). If the court was to direct the Director of Public Prosecutions to prosecute, there would be some degree of supervision required



on whether the prosecution is being undertaken or not. A mandamus order would not issue in such circumstances.

- 18 Turning on the question of retrieval of information from the 1st respondent or any of the respondents for that matter, the information sought by the applicant, if leave is granted in terms of prayer 2 of the chamber summons is, no doubt, in the custody of a public body and therefore access to such information would be subject to the provisions of *Access to Information Act* No. 31 of 2016. According to section 3 of that Act, the object and the purposes of the Act is to, inter alia,

“give effect to the right of access to information by citizens as provided under Article 35 of the *Constitution*.”

- 19 The procedure for applying and processing the application to access information is provided for under sections 8 and 9 respectively of the Act. Section 8 states as follows:

8. Application for access

- (1) An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.
- (2) Where an applicant is unable to make a written request for access to information in accordance with subsection (1) because of illiteracy or disability, the information officer shall take the necessary steps to ensure that the applicant makes a request in manner that meets their needs.
- (3) The information officer shall reduce to writing, in a prescribed form the request made under subsection (2) and the information officer shall then furnish the applicant with a copy of the written request.
- (4) A public entity may prescribe a form for making an application to access information, but any such form shall not be such as to unreasonably delay requests or place an undue burden upon applicants and no application may be rejected on the ground only that the applicant has not used the prescribed form.

On its part, section 9 reads as follows:

9. Processing of application

- (1) Subject to section 10, a public officer shall make a decision on an application as soon as possible, but in any event, within twenty one days of receipt of the application
- (2) Where the information sought concerns the life or liberty of a person, the information officer shall provide the information within forty-eight hours of the receipt of the application.
- (3) The information officer to whom a request is made under subsection (2) may extend the period for response on a single occasion for a period of not more than fourteen days if—
 - (a) the request is for a large amount of information or requires a search through a large amount of information and meeting the stipulated time would unreasonably interfere with the activities of the information holder; or



- (b) consultations are necessary so as to comply with the request and the consultations cannot be reasonably completed within the stipulated time.
- (4) As soon as the information access officer has made a decision as to whether to provide access to information, he or she shall immediately communicate the decision to the requester, indicating—
 - (a) whether or not the public entity or private body holds the information sought;
 - (b) whether the request for information is approved;
 - (c) if the request is declined the reasons for making that decision, including the basis for deciding that the information sought is exempt, unless the reasons themselves would be exempt information; and
 - (d) if the request is declined, a statement about how the requester may appeal to the Commission";
- (5) A public officer referred to in subsection (1) may seek the assistance of any other public officer as the first mentioned public officer considers necessary for the proper discharge of his or her duties and such other public officer shall render the required assistance.
- (6) Where the applicant does not receive a response to an application within the period stated in subsection (1), the application shall be deemed to have been rejected.

20 What these provisions of the law entail is that there is a prescribed procedure in the [Access to Information Act](#) for accessing the kind of information for which the applicant is seeking a mandamus order.

21 In summary, an application has to be made to a public officer for the information sought. The officer will process the information and make a decision on whether or not to release the information within twenty-one days of the date of receipt of the application. However, where the applicant does not receive a response on his application within the stipulated period, the application shall be deemed to have been rejected.

23 Section 9(4) (d) implies that where the application is rejected, the applicant for the information has the option of appealing to the Commission on Administrative Justice established under established by section 3 of the [Commission on Administrative Justice Act](#), No. 23 of 2011.

24 No reason has been proffered why the applicant chose to move a judicial review court to obtain information when the manner of accessing such information has been prescribed by an Act of Parliament.

25 It is trite that the existence of an alternative remedy is never enough to oust jurisdiction in judicial review (see *Leech versus Deputy Governor of Parkhurst Prison* (1988) AC 533 per Lord Bridge at 562D). However, it has been held in *R versus Inland Revenue Commissioners, ex p Preston* (1985) AC 835 that:

A remedy by way of judicial review is not to be made available where an alternative remedy exists...Judicial review is a collateral challenge: it is not an appeal. Where parliament has provided by statute appeal procedures, as in taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision..."



26 Addressing the same issue in *R versus Peterkin, ex p Soni* (1972) Imm AR 253 Lord Widgery CJ had this to say:

Where Parliament has provided a form of appeal which is equally convenient in the sense that the appellate tribunal can deal with the injustice of which the applicant complains this court should in my judgement as a rule allow the appellate machinery to take its course. The prerogative orders form the general residual jurisdiction of this court whereby the court supervises the work of inferior tribunals and seeks to correct injustice where no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when other and adequate jurisdiction exists elsewhere.

27 Our very own Court of Appeal has held in the *Speaker of the National Assembly v. Karume*, Civil Application No. NAI 92 OF 1992 that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed.

28 And section 9(2) of the *Fair Administrative Action Act* No. 4 of 2015 is also clear that this court should not entertain disputes whose resolution has been provided for elsewhere by an Act of Parliament. It states as follows:

(2) Procedure for judicial review.

29 The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

30 Thus, both the statute and precedent point to the conclusion that it is pertinent for an aggrieved party to embrace alternative remedies including appellate procedures that have been prescribed by statute before moving court for judicial review remedies. The reviewing courts will always be conscious that in considering whether a public body may have abused its powers they must not abuse their own by entertaining matters which they otherwise need not have entertained.

31 To the extent that the applicant has attempted to sidestep the means provided by statute to obtain the information for which he seeks a mandamus order, the application is misconceived.

32 But it is also incompetent for one other reason. The mandatory grounds of judicial review upon which the application for judicial review would be grounded upon have not been given. All that the applicant has given as grounds of objection are the depositions he has made in the verifying affidavit.

33 It is not in dispute that one of the vital components of an application for judicial review is the grounds upon which it is made. They are important because Order 53 Rule 1(2) states in mandatory terms that the statement accompanying the application must contain, among other things, the grounds upon which 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).

34 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.



What are these grounds?

35 The grounds for judicial review were enunciated in the English case of *Council of Civil Service Unions versus Minister for the Civil Service* (1985) A.C. 374,410 in which 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.

36 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.

37 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 K.B. 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] A.C. 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.

38 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.”

39 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 that the principle of proportionality as a further ground for judicial review has been developed.

40 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.”

41 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.

42 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. The applicant’s application is such an application and for this reason it cannot see the light of day.

43 For these reasons, leave is refused and the applicant’s application is hereby dismissed. I make no orders as to costs.

SIGNED, DATED AND DELIVERED ON 28 OCTOBER 2022

NGAAH JAIRUS

JUDGE

