Okoiti v Director of Public Prosecutions (Application E132 of 2021)
[2022] KEHC 18053 (KLR) (Judicial Review) (28 October 2022) (Ruling)

Neutral citation: [2022] KEHC 18053 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E132 OF 2021

J NGAAH, J

OCTOBER 28, 2022

BETWEEN

PAUL MAKOKHA OKOITI ..... APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

RULING

1. The application before court is a chamber summons dated 17 January 2022. The law under which it has been brought has not been stated but it seeks leave for the applicant to file an application for two prerogative orders of mandamus. The prayers for leave have been framed as follows:

> "(a) The applicant be granted leave to apply for an order of mandamus directed to the Director of Public Prosecutions, to give to the applicant, the letter that the office of the Director of Public Prosecutions relied upon to clear Mr. Pius Nyaga of Kenya Revenue Authority (KRA) from abuse of office Ref. No. DCI/ IB/ECCU/SEC/4/4/1 Vol. XXXIV/152 dated 30th May, 2018.
>
> (b) An order of mandamus directed to the Director of Criminal Investigations to give the applicant, the investigation report in respect of DCI enquiry No. 92/2019".

2. The application is based on a statement dated 25 June 2021 and an affidavit verifying the facts relied upon sworn by the applicant on even date.

3. The depositions in the verifying affidavit are not that clear but I gather from the copies of correspondence exhibited to the affidavit that the applicant lodged a complaint of abuse of office to the Director of Criminal Investigations against one Janet Lavuna.

4. This is clear from the applicant's letter dated 23 August 2018 addressed to the directorate of criminal investigations. In this letter, the applicant states that, a public servant employed by the Kenya Revenue Authority cannot take private briefs without instructions from the Commissioner General of the Authority. Yet Pius Nyaga acted in a private matter without such authority. The applicant then asked the directorate of criminal investigation to:

> "(a) establishment (*sic*) why Pius Nyaga is on record in a private matter in court
>
> (b) recommended (*sic*) the necessary action to be taken against Kenya Revenue Authority if found culpable of using public money for private matter in court.
>
> (c) make any direction that it deems fit in the circumstances of the above matter."

5. It would appear that the directorate of criminal investigations acted on the applicant's complaint and investigated the case because by a letter dated 6 August 2019, the office of the Director of Public Prosecutions responded to a letter by the Director of Criminal Investigations forwarding to his office the investigations file for advice on the applicant's complaint.

6. In that letter Ms. Emily Kamau, writing on behalf of the Director of Public Prosecutions, wrote as follows:

> "I am directed by the Director of Public Prosecutions to acknowledge receipt of your letter dated 30th May 2018 forwarding the above quoted file to this office for directions.
>
> Upon careful perusal of the evidence therein I find that there is no evidence that E1 abused his authority by acting for E2. This is due to the fact E1 was duly appointed by KRA to represent E2 in a civil claim against her. In the foregoing, E1 cannot be said to have abused his office nor was any prejudice occasioned to the complainant.
>
> Accordingly, I agree with your recommendations that the file should be returned with no further police action.
>
> Your duplicate file is herewith the returned.
>
> Signed
>
> Emily Kamau, OGW"

7. In his letter dated 16 November, 2020 addressed to the Director of Public Prosecutions, the applicant appears not to have been satisfied with the criminal investigations directorate's recommendation and the Director of Public Prosecution's decision not to pursue any further the applicant's complaint. In that letter he wrote as follows:

> "RE: DCI Inquiry No. 92/2019
>
> Take notice that I urgently need a copy of the letter Ref: DCI/IB/ECCU/SEC/4/41VOL.XXX1V/152 dated 30th May, 2018 that you relied upon to clear Mr. Pius Nyaga of KRA from abuse of office and the copy of appointment letter of Mr. Pius Nyaga of KRA to act in case no. 4201 of 2017.
>
> Kindly note that if I don't get your replies within 14 days from date of this letter, I will move to court to apply for an order of mandamus for production of the same without further reference to you."

8. It is not clear how the applicant got to know of the Director of Public Prosecution's letter because the letter was not copied to him. Nonetheless, it would appear the Director of Public Prosecutions did not respond to the applicant's letter hence the present application.

9. The respondent opposed the application and filed grounds of objection dated 24 November, 2021. According to the respondent, no cause of action has been disclosed against the respondent and, in particular, the applicant has not demonstrated the existence of a legal right to performance of a legal duty which the respondent has failed to perform.

10. I have considered the application and the submissions filed on behalf of the applicant and the respondent in support of and in opposition to the application respectively.

11. 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."

12. 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.

13. In considering whether the applicant's intended suit is arguable, my attention has been drawn to one of the letters the applicant wrote to the Director of Public Prosecutions in his quest to obtain certain documents from him. In this letter dated 12 October 2020, the applicant wrote, inter alia, as follows:

> "Refer to your letter Ref: ODPP/CAM/5/019/181 dated 26th August, 2019. However, according to Article 35 1 (a) (b) of the *Constitution of Kenya*, 2010, could you supply me with the following..."

14. Among the documents the applicant has asked for is a copy of a letter that the applicant wants the respondent to be compelled to produce by the order of mandamus if leave is granted.

15. By invoking Article 35 of the *Constitution* which guarantees every citizen a right to access to information, the applicant must have also been aware of the *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*."

16. 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.

17. 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.

18. What these provisions of the law show 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. 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.

19. 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.

20. 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.

21. It is trite that the existence of an alternative remedy is never enough to oust jurisdiction in judicial review (see *Leech v Deputy Governor of Parkhurst Prison* (1988) AC 533 per Lord Bridge at 562D). However, it has been held in *R v Inland Review 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 ... "

22. Addressing the same issue in *R v 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 were 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."

23. 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.

24. 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:

9(2). Procedure for judicial review.

> 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.

25. 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 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.

26. The applicant's application is thus misconceived. But it is also incompetent for one other reason. The mandatory grounds of judicial upon which the application for judicial review would be grounded upon have not been given.

27. 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)

28. 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.

29. What are these grounds?

The grounds for judicial review were enunciated in the English case of *Council of Civil Service Unions v Minister for the Civil Service* (1985) AC 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."

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.

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."

30. 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.

31. None of these prescribed grounds has been stated in the statement accompanying the application for leave. At any rate, they have not been stated in precise, specific and unambiguous terms. What has been presented as grounds is stated in the statement as follows:

> "7. The applicant is a citizen of this country who has the right to information affecting his life as enshrined in Article 35 1 (a) (b) of the *Constitution of Kenya* 2010.
>
> 8. That letter was the basis of the Director of Public Prosecutions to clear Mr. Pius Nyaga for the abuse of office and until the letter is given, the applicant's complaint will remain unresolved forever which is against the spirit of Article 47 (1) (2) and 50 (1) of the *Constitution*.

9. The request served upon the Director of Public Prosecution on 13th October, 2020 and 16th November, 2020 has not been complied with and the applicant is compelled to make this application to get it."

35. Looking at these averments, it is not clear on which of the ground or grounds of judicial review the applicant has anchored his application. I would be speculating if I was to proceed on the presumption that the application is based on any particular ground or grounds.

36. But the court cannot, and need not speculate on what is on the mind of any particular applicant because it is the applicant's obligation, in the first place, to state categorically the ground or grounds upon which he seeks a judicial review court to intervene and impeach the administrative action in issue.

37. 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."

38. 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.

39. 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.

40. 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