



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. MISC E007 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF CRIMINAL

INVESTIGATIONS.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC

PROSECUTIONS.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

EX-PARTE APPLICANT:

PATRICK MUCHIRI GACHARA

RULING

1. The *ex parte* Applicant herein, Patrick Muchiri Gachara, has filed an application herein by way of a Chamber Summons dated 18th January 2021, seeking the following orders:

1. THAT this matter be certified as urgent and the court be heard ex parte.

2. THAT the leave be granted to the applicant to apply for judicial review orders for certiorari, to remove into this court for purposes of being quashed, the 1st respondent's decision and action of investigating , initiating prosecution by presentation of a charge sheet dated 15th July 2020 or continuation of prosecution of the applicant at the instance of the 1st Respondent in Makadara chief magistrates court criminal case number 1560 of 2020.

3. THAT leave be granted to the applicant to apply for judicial review orders of prohibition against the respondents prohibiting the continuation of prosecution of the applicant at the instance of and or based on the investigations of the 1st Respondent and the charge sheet dated 15th July 2020 in Makadara chief magistrates court criminal case number 1560 of 2020.

4. THAT the leave granted herein do operate as a stay of the continuation of prosecution of the applicant at the instance of and or based on the investigations of the 1st respondent and the charge sheet dated 15th July 2020 in Makadara chief magistrates court criminal case number 1560 of 2020 pending the filing, hearing and determination of the substantive motion.

5. THAT costs be in the cause.

2. The said application is supported by a statutory statement dated 18th January 2021, and a verifying affidavit sworn on the same date by the *ex parte* Applicant. The main ground for the application is that the 1st respondent has acted acting ultra vires, unreasonably and abused its powers under section 35 of the National Police Act by investigating, initiating and participating in prosecution of petty crimes and misdemeanors. The *ex parte* Applicant annexed copies of the charge sheet against him in Criminal Case number 1560 of 2020.

The Determination

3. I have considered the application dated 18th January 2021 and the applicable law on leave to commence judicial review proceedings, which is *Order 53 Rule 1* of the Civil Procedure Rules. The reasons for the leave was explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** is to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless, and 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.

4. It is also trite that in an application for leave such as the present one, the Court ought not to delve into the arguments of the parties, but should make cursory perusal deeply of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was in this regard explained by Lord Bingham in **Sharma vs 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, however, that the test is flexible depending on the nature and gravity of the issues.

5. In the present application, the *ex parte* Applicant has provided evidence of criminal case brought against him, and to this extent I find that he has met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings of mandamus against the Respondent.

6. On the question of whether the said leave can operate as a stay of the impugned report, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. *Order 53 Rule 1(4)* of the Civil Procedure Rules provides as follows in this respect:

“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.”

7. In **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision, and in various decisions by Kenyan Courts.

8. It has in this regard been held that were the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation.

9. See in this regard the decisions in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006**, **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995**, **Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR** and **James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR**.

10. In the circumstances of this application however, even though the *ex parte* Applicant's prosecution is of a continuing nature, I am of the view that the interests of justice and public interest would be better served if the prosecution is not stayed, and the substantive application proceeds to hearing and determination expeditiously.

The Orders:

11. In the premises the Chambers Summons application dated 18th January 2021 is allowed to the extent of the following orders:

I. The Chambers Summons application dated 18th January 2021 is certified urgent and admitted to hearing *ex parte*.

II. The *ex parte* Applicant is granted leave to apply for an order of judicial review of certiorari, to remove into this court for purposes of being quashed, the 1st Respondent's decision and action of investigating, initiating, and continuing with the *ex parte* Applicant's prosecution by presentation of a charge sheet dated 15th July 2020 in Makadara Chief Magistrates Court Criminal Case Number 1560 of 2020.

III. The *ex parte* Applicant is granted leave to apply for an order of judicial review of prohibition against the Respondents prohibiting the continuation of prosecution of the *ex parte* Applicant at the instance of and based on the investigations of the 1st Respondent and the charge sheet dated 15th July 2020 in Makadara Chief Magistrates Court Criminal Case Number 1560 of 2020

IV. The prayer that the leave so granted operates as a stay of the continuation of prosecution of the *ex parte* Applicant at the

instance of and or based on the investigations of the 1st Respondent and the charge sheet dated 15th July 2020 in Makadara Chief Magistrates Court Criminal Case Number 1560 of 2020 is declined.

V. The costs of the Chamber Summons dated 18th January 2021 shall be in the cause.

VI. The *ex parte* Applicant shall file the substantive Notice of Motion, and shall serve the Respondents with (i) the Chamber Summons application dated 18th January 2021, (ii) the substantive Notice of Motion and submissions thereon, (iii) a copy of this ruling, and (iii) a mention notice, within twenty-one (21) days from today's date.

VII. Upon being served with the said pleadings and documents, the Respondents shall be required to file their responses to, and submissions on the substantive Notice of Motion within twenty-one (21) days from the date of service.

VIII. This matter shall be mentioned on 15th April 2021 to confirm compliance and for further directions.

IX. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the *ex parte* Applicant's substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

X. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.

XI. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XII. The parties shall also be required to file and send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XIII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 15th April 2021.

XIV. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant by electronic mail by close of business on Thursday, 21st January 2021.

XV. Parties shall be at liberty to apply.

12. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF JANUARY 2021

P. NYAMWEYA

JUDGE