



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. MISC. E022 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND ROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

CHIEF MAGISTRATE'S COURT AT KIBERA.....3RD RESPONDENT

AND

GODFREY KIRIMI MUTUA.....INTERESTED PARTY

AND

EX PARTE:

JAMES NDUNGU GETHENJI

RULING

The Application

1. James Ndungu Gethenji, the *ex parte* Applicant herein, has filed an application by way of a Chamber Summons dated 18th February 2021, seeking the following orders:

1. This application be certified urgent and heard *ex parte* in the first instance.

2. Leave be granted to the Applicant to commence judicial review proceedings for an order of Certiorari, to quash the decision by the Respondents to charge the *ex parte* Applicant with the offense of assault causing actual bodily harm c/s 251 Penal Code before the Chief Magistrate's Kibera arising from complaint in OB No. 02/06/2021.

3. Leave be granted to the Applicant to commence judicial review proceedings for an order of Prohibition, to prohibit the Respondents from charging the Applicant with the impugned offence before the Chief Magistrates Court at Kibera or any other Court in the Republic or to register any charge sheet of a similar offence or from same transaction before any Court in the Republic or to sustain any proceedings thereto.

4. The leave granted do operate as a stay of criminal proceedings on a charge of assault occasioning bodily harm c/s 251 Penal Code being registered against the Applicant, before the Chief Magistrate's Court at Milimani, stay of any charge sheet registered against the Applicant before the said Court, stay of any criminal proceedings commenced pursuant thereto.

5. The costs of this Application be provided for.

2. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 18th February 2021, and a verifying affidavit sworn on the same date by the *ex parte* Applicant.

3. In summary, the main grounds are that the *ex parte* Applicant is the Chairman and Director of Kihingo Village Management One Limited and also a resident of Kihingo Village in Kitusuru. Further, that some residences of the village have attempted to remove the *ex parte* Applicant as chairman, and have stationed vigilantes at the entrance of Kihingo Village whose sole purpose to harass and intimidate the *ex parte* Applicant and anybody visiting his residences. In addition, that the Respondents in abuse of their powers have sought to charge the *ex parte* Applicant with the offense of assault after he had reported an attack on his person by the said vigilantes including a compliant to Gigiri Police Station DCI offices. The *ex parte* Applicant stated that he has since been summoned to appear at the Chief Magistrates Court at Kibera on the 19th February 2021 arising from a purported complaint entered in OB02/06/02/2021 at Gigiri Police Station.

4. The *ex parte* Applicant in this respect annexed copies of correspondence on his complaint, a statement he made at the Gigiri DCI, and a bond and bail receipt.

The Determination

5. I have considered the application dated 18th February 2021 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicant has demonstrated that this matter is urgent. This for reason that the subject charges are likely to affect the *ex parte* Applicant's rights and liberty.

6. On the orders sought by the *ex parte* Applicant for leave to commence judicial review proceedings, the applicable law is Order 53 Rule 1 of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the leave as 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 ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

7. It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make a cursory perusal of the evidence before it, and make a decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was in this respect explained by Lord Bingham in **Sharma vs Brown Antoine (2007) 1 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.

8. In the present application, the *ex parte* Applicant has provided evidence of the complaint made and summons to appear before the Chief Magistrate's Court at Kibera, and has averred as to the grounds and reasons why it considers the complaint against him to be improper. However, there is no evidence of any charges brought against the *ex parte* Applicant which is what he seeks to quash, prohibit and stay. For this reason, the Chamber Summons dated 18th February 2021 needs to be canvassed *inter partes* for this Court to be able to gauge if the threshold of an arguable case has been met.

The Orders

9. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 18th February 2021 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants' Chamber Summons application dated 18th February 2021 be and is hereby certified as urgent.

II. The *ex parte* Applicant shall serve the Respondents and Interested Party with the Chamber Summons application dated 18th February 2021 and skeletal submissions thereon within fourteen (14) days from today's date.

III. Upon being served with the said pleadings and documents, the Respondents and Interested Party shall be required to file their responses to the Chamber Summons application dated 18th February 2021 and skeletal submissions thereon within fourteen (14) days from the date of service.

IV. The hearing of the Chamber Summons application dated 18th February 2021 shall be held on 22nd March 2021 before Hon. Mr. Justice Ngaah, as this Court will be on leave.

V. 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 Chamber Summons application dated 18th February 2021 on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

VI. 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.

VII. 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.

VIII. The parties shall also be required to file their respective affidavits evidencing service in the Judiciary's e-filing system.

IX. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 22nd March 2021 before Hon. Mr. Justice Ngaah.

X. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicants by electronic mail by close of business on Friday, 19th February 2021.

XI. Parties shall be at liberty to apply.

10. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF FEBRUARY 2021

P. NYAMWEYA

JUDGE