



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

MISC JUDICIAL REVIEW APPLICATION NO. E002 OF 2021

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

AND

IN THE MATTER OF THE BILL OF RIGHTS CHAPTER 4 OF THE CONSTITUTION OF KENYA

AND IN THE MATTER OF THE ATTORNEY GENERAL

AND

IN THE MATTER OF THE OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS

AND

IN THE MATTER OF THE SIAYA PRINCIPAL MAGISTRATE'S COURT CRIMINAL CASE NO. 1109 OF 2019

AND

IN THE MATTER OF THE SIAYA PRINCIPAL MAGISTRATE'S COURT CRIMINAL CASE NO.1127 OF 2019

AND

IN THE MATTER OF UKWALA PRINCIPAL MAGISTRATE'S COURT CRIMINAL CASE NO 332 OF 2020

AND

IN THE MATTER OF

WALTER MUSUNGU MUYODI.....1ST APPLICANT

MICHAEL AWITI WANJERO.....2ND APPLICANT

PETER OTIENO OUMA.....3RD APPLICANT

HENRY SHISIA MATALANGA.....4TH APPLICANT

AND

LAWRENCE GODIA.....1ST INTERESTED PARTY

MATHLIDA AWUOR MUHAWAN.....2ND INTERESTED PARTY

ANDREW ODHIANMBO ABIERO.....3RD INTERESTED PARTY

RULING

1. The applicants herein are all facing criminal charges of either stock theft contrary to section 278 of the Penal Code and impersonation with intent to defraud contrary to section 382 of the penal Code or being unlicensed auctioneer contrary to section 9(1)(2) of the Auctioneers Act. The charges are pending before both Ukwala and Siaya Principal Magistrates' Courts.

2. They bring this application by way of Chamber Summons under the provisions of the Law Reform Act and Order 53 of the Civil Procedure Rules, seeking for leave of court to be granted to apply for judicial review orders of Certiorari to bring into this court and quash the decision of the DCIO and the ODPP to charge them with the various offences as per the annexed charge sheets and orders of prohibition to prohibit the Magistrates' Courts at SIAYA AND Ukwala from proceeding with the said criminal proceedings affecting the applicants.

3. The Chamber summons is supported by the statement of facts (statutory statement) and verifying affidavits together with the annexures thereof.

4. Essentially, the applicants claim that they were charged before the Ukwala Magistrates Court and Siaya Principal Magistrate's Court for alleged stock theft and being unlicensed auctioneers as well as impersonation with intent to defraud contrary to the law. They however allege that they were executing for recovery of civil debts owed to their client SIDINDI TRADERS SAVINGS AND CREDIT COOPERATIVE SOCIETY LIMITED and that they even obtained orders for security from court before proceeding to attach properties belonging to the interested parties herein in accordance with the terms and conditions of borrowing funds from the said Society by the interested parties.

5. The applicants claim that the institution of criminal charges against them is in violation of their constitutional rights and an abuse of court process.

6. This application is *ex parte*.

7. Having considered the application dated 23rd March 2021, the statement of facts, verifying affidavits and the annexures thereof, the issue for determination is whether the court shall on the known principles grant leave to institute judicial review proceedings and whether the grant of such leave shall operate as a stay of the decision to charge the applicants with the various criminal offences as per the annexed charge sheets, in terms of Order 53 Rule 1 (3) of the Civil Procedure Rules.

8. On the first prayer relating to certiorari, I note that being an intended application for certiorari, I observe that the application is not affected by the requirement to file with six months of the challenged decision as the decision in this case is not *ejusdem generis* a **judicial** decision in the nature of "*judgment, order, decree, conviction or other proceeding*" within the meaning of Order 53 Rules (2) of the Civil Procedure Rules, which provides that:

"2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

9. The applicants were charged before the Ukwala Magistrates Court and Siaya Principal Magistrate's Court for alleged stock theft and being unlicensed auctioneers. They alleged that they were executing for recovery of civil debts owed to their client and that they even obtained orders for security from court before proceeding to attach properties belonging to the interested parties. The decision by the DCIO and the ODPP to charge is not a judicial decision but an administrative decision. Accordingly, the prayer for leave to apply for certiorari is to be considered on its merits.

10. On whether I should grant leave to apply for the judicial review orders of certiorari and prohibition, the Court of Appeal in ***Meixner & Another v. Attorney General*** (2005) 2 KLR 189 held that:

"1. The leave of the court is a prerequisite to making a substantive application for judicial review. The purpose of the leave is to filter out frivolous applications. The granting of leave or otherwise involves an exercise of judicial discretion. The Court of Appeal can only interfere with the discretion of the judge denying the appellants leave to apply for judicial review on the firmly established principles stated in Mbogo v Shah [1968] EA 93."

11. An **arguable** or prima facie case has been judicially defined in the context of an application for injunction pending appeal as one that is **not frivolous** in ***Christopher Ndarathi Murungaru v. Kenya Anti-Corruption Commission & another*** [2006] eKLR (Omolo, Tunoi & O'Kubasu, JJA) (as they then were) where the Court of Appeal stated:

"The principles which the Court applies in applications of this nature are now old-hat – an applicant under Rule 5(2)(b) must show an arguable appeal, i.e. an appeal which is not frivolous and next he must show that if the stay or the injunction sought is not granted, the intended appeal, if it were to be successful, would have been rendered nugatory by the refusal to grant the stay."

12. Similarly in ***EAST AFRICAN CABLES LIMITED v PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD & ANOTHER*** [2007] eKLR (Tunoi (as he then was), O'Kubasu & Githinji, JJA.) while considering another Rule 5 (2) (b) application for injunction said as follows:

"The orders are sought under rule 5(2) (b) of the Rules of this Court and the principles that guide the Court in considering such applications are now well settled. The applicant, in order to succeed, must satisfy the Court that the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal."

13. The Court of Appeal in the **Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR**, (Nambuye, Kiage and M'noti, JJA.) has in the context of an appeal relied on a test for an **arguable** case of compact phraseology of **a single bona fide point which need not succeed**, citing the Court's decision in **STANLEY KANGETHE KINYANJUI vs. TONY KETTER & 5 OTHERS [2013] eKLR**, that -

“vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.

vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008

14. The Superior Court concluded that **“arguable appeal** is no more than one that raises a single bona fide point to be urged and worthy of response from the other side and interrogation by the Court” [and] **“those points or any one of them need not succeed, which is itself a matter in the purview of the Judges to hear the appeal.”**

15. By analogy, an applicant for leave must show that he has a serious question to be put before the court for determination, but he need not, and indeed cannot, show that it is one that must succeed because at this stage of leave the court has not had the opportunity to hear from the Respondent.

16. The main issue in this application is therefore whether the applicant herein has made out a prima facie case fit to be entertained substantively at the substantive stage under the provisions of **Order 53 (3) of the Civil Procedure Rule.**

17. In answering this question, care is exercised so as not to prejudice any of the parties by making any pronouncements on the merits of the issues raised. It follows that I shall not delve into the merits of the issues raised.

18. I have examined the statement of facts and the verifying affidavits by the applicants and I am satisfied that the allegations made therein merits a chance for further interrogation and canvassing at the substantive stage.

19. I am persuaded that the application for leave to apply for the remedy of certiorari and prohibition against the decision to charge and prosecute the exparte applicants is merited. I grant leave to apply.

20. On whether leave if granted should operate as stay of proceedings in the stated cases pending before the Magistrate's courts, I observe that all the applicants are facing the various criminal charges before the trial courts, which cases are likely to be heard and determined before the intended application is heard and determined thereby rendering the impending application nugatory and the applicants will be rendered mere **pious explorers** in the pursuit of justice. Accordingly, stay of proceedings is necessary.

21. In the end, I hereby allow this application and grant leave for the applicants to apply for judicial review orders of certiorari as prayed in prayer No. (b) of the Chamber Summons dated 23rd March 2021, to quash the decision by the ODPP and the DCIO to charge them with the various criminal charges pending the Siaya Magistrates' Courts vide Cr 1109 of 2019, Cr 1127 of 2019 and Ukwala Cr 332 of 2020.

22. I further grant leave to the applicants to apply for prohibition to prohibit the Magistrate's Courts at Siaya and Ukwala from proceeding with the criminal cases listed in prayer No.(c) of the Chamber Summons dated 23rd March 2021.

23. I further order that the applicants shall file and serve the intended substantive Notice of Motion within ten days of this ruling

24. I further order that the leave herein granted shall operate as stay of criminal proceedings pending in the said courts until the intended application once filed is heard and determined on its merits.

25. Costs shall abide the outcome of the substantive motion.

26. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 24TH DAY OF MARCH 2021

R.E.ABURILI

JUDGE

In the presence of:

Ms Luyali Advocate for the applicants

CA: Modestar and Mboya