



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. MISC E065 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR

JUDICIAL REVIEW ORDERS OF PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

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

THE CHIEF MAGISTRATE'S COURT AT MILIMANI LAW COURTS.....3RD RESPONDENT

AND

FIRST COMMUNITY BANK.....1ST INTERESTED PARTY

TP MAZEMBE.....2ND INTERESTED PARTY

EX-PARTE APPLICANT:

ECOBEAST TRAVEL AND SAFARIS LTD

RULING

The Application

1. The *ex parte* Applicant herein, Ecobeast Travel and Safaris Ltd, has filed an application herein by way of a Chamber Summons dated 30th April 2021, seeking the following orders:

1. THAT this application be certified as urgent and be heard on an ex-parte basis, for the reasons of urgency stated in the certificate herein.
2. THAT the ex parte Applicant, ECOBEAST TRAVEL AND SAFARIS LTD be granted leave to apply for an Order of Prohibition directed to the Respondents to prohibit, forbid and to act a restraint to any criminal investigations, trial, commencement and/or continuation of any Proceedings/Investigations as already shown and started in the Milimani Chief Magistrate's Court in Miscellaneous Criminal Application No. E1171 of 2021, where the Ex parte Applicant's Bank Account has been frozen for investigations.
3. THAT the leave so granted DO OPERATE AS A STAY against any Investigations and/or Summons to appear before the Investigating Officer, who is an agent of the 2nd Respondent.

4. THAT the costs of this application be in the cause

2. The said application is supported by a statutory statement dated 30th April 2021, and a verifying affidavit sworn on the same date by Abdi Khani, the *ex parte* Applicant's Managing Director. The main ground for that the 2nd Interested Party cancelled a contractual agreement it had entered with the *ex parte* Applicant for the provision of a Chartered Aircraft on the 31st March 2021, and demanded a full refund of the monies deposited with the *ex parte* Applicant.

3. However, that the *ex parte* Applicant's Terms & Conditions relating to refunds whenever the other contracting party cancels a contract provide for a 50% cancellation fee, and that the 2nd Interested Party disputed the refund amount that was offered made a report to the 2nd Respondent in which it misrepresented facts and issues relating to its dealings with the *ex parte* Applicant.

4. That as a result, the 2nd Respondent commenced investigations against the *ex parte* Applicant for an alleged offence of obtaining money by false pretenses contrary to section 313 of the Penal Code, and that vide **Miscellaneous Criminal Application No. E1171 of 2021** the 1st and 2nd Respondents moved the 3rd Respondent and obtained orders freezing/preserving the *ex parte* Applicant's Account Number 0015172701 held at First Community Bank for 10 days starting 19th April 2021 up to 28th April 2021.

5. Further, that the 3rd Respondent also issued warrants permitting agents of the 1st and 2nd Respondents to access, investigate and retrieve statements and transactional details in respect to the aforementioned account belonging to the *ex parte* Applicant, whose business is now paralyzed.

6. The *ex parte* Applicant annexed copies of the pleadings filed, and of orders given in **Miscellaneous Criminal Application No. E1171 of 2021**.

The Determination

7. I have considered the application dated 30th April 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.

8. 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.

9. In the present application, I note that the *ex parte* Applicant is aggrieved by interim orders and proceedings in a miscellaneous application. It is my view that the issue as to whether this Court as a judicial review Court is the proper forum to address his grievances in the circumstances needs to be addressed first, before leave can be granted to commence judicial review proceedings.

The Orders:

10. In the premises, the application dated 30th April 2021 will need to be canvassed *inter partes*. I accordingly order as follows:

I. The Chambers Summons application dated 27th October 2020 is certified urgent and admitted to hearing ex parte.

II. The *ex parte* Applicant shall serve the Respondents with the Chamber Summons application dated 30th April 2021 and skeletal submissions thereon within ten (10) days from today's date.

III. Upon being served with the said pleadings and documents, the Respondents shall be required to file their responses to, and submissions on Chamber Summons application dated 30th April 2021 within TEN (10) days from the date of service.

IV. The Chamber Summons application dated 30th April 2021 shall be heard by email on 24th May 2021.

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 30th April 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 by email on 24th May 2021.

X. 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 Monday, 3rd May 2021.

XI. Parties shall be at liberty to apply.

11. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF APRIL 2021

P. NYAMWEYA

JUDGE