



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. MISC E075 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 PUBLIC PROSECUTIONS.....1ST RESPONDENT

CHIEF MAGISTRATE'S COURT AT MILIMANI LAW COURTS.....2ND RESPONDENT

EX PARTE APPLICANT: JAMES MWANGI KANYI

RULING

1. This ruling is on the *ex parte* Applicant's application by way of a Chamber Summons dated 20th May 2021, seeking the following orders:

1. THAT that this application be certified urgent and be heard and determined forthwith.

2. THAT the Applicant be granted leave to apply for an ORDER OF CERTIORARI to remove into the High Court and quash the 1st Respondents decision to prefer charges against the Applicant which decision is set out in the Charge Sheet dated 10th May 2021 and registered before the 2nd Respondent in Milimani Chief Magistrates Criminal Case No. E570 of 2021.

3. THAT the Applicant be granted leave to apply for an ORDER OF PROHIBITION directed at the 1st Respondent, its officers and any other authority acting on its instructions from prosecuting or proceeding with the prosecution of the Applicant on the offence of obtaining goods by false pretences contrary to section 313 of the Penal Code in Milimani Chief Magistrates Criminal Case No. E570 of 2021 or any other related charges.

4. THAT the Applicant be granted leave to apply for an ORDER OF PROHIBITION directed at the 2nd Respondent prohibiting the 2nd Respondent from hearing, proceeding with or in any way entertaining Milimani Chief Magistrates Criminal Case No. E570 of 2021.

5. THAT the leave so granted do operate as a stay of proceedings in Milimani Chief Magistrates Criminal Case No. E570 of 2021 pending the hearing and determination of the substantive Notice of Motion.

6. THAT the Court be at liberty to make such further and other orders that it deems fit to meet the ends of justice.

7. THAT the costs of this application be provided for.

2. The application is supported by an amended statutory statement dated 20th May 2021 and a verifying affidavit sworn on the same date by the *ex parte* Applicant. The main ground raised by the *ex parte* Applicant is that the impugned criminal proceedings emanate from purely commercial transactions and a civil dispute between Messrs. Mirage Supply & Contractors Limited, the *ex parte* Applicant's company, and

Beatrice Wairimu trading as Britine General Suppliers, Miriam Wanjiru Mwaura trading as One Plus Enterprise and Phoebe Wakiini Muita trading as Dreams Enterprise, who are the complainants therein. Further, that the *ex parte* Applicant's company has, in honouring its contractual obligations, substantially settled the amount owed to the Complainants.

The Determination

3. I have considered the Chamber Summons application dated 20th May 2021, and the applicable law for leave to commence judicial review proceedings, namely *Order 53 Rule 1* of the Civil Procedure Rules. 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.

4. It is also trite that the Court then ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it 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) 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.

5. In the present application, the *ex parte* Applicant has provided copies of the charge sheet brought against him in **Milimani Chief Magistrates Criminal Case No. E570 of 2021**, and of the commercial documents exchanged between his company and the complainants, and has also averred as to the reasons why his criminal prosecution is unlawful. To this extent I find that the *ex parte* Applicant has met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondents.

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. I am guided by the exposition on the purpose of a stay in **R (H.) vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, where 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, and to ensure that a party who is eventually successful in his or her challenge is not denied the full benefit of the success.

8. 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. It has in this regard been held that where 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. These positions were also explained in 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 present application, the charges against the *ex parte* Applicant require certain actions of a continuing nature to be taken by the Respondents in relation to their prosecution, and the said charges are therefore amenable to stay. In addition, the *ex parte* Applicant's application will also be rendered nugatory if the stay order is not granted. The stay orders are therefore merited to this extent.

11. This Court however noted that the complainants in the criminal case in **Milimani Chief Magistrates Criminal Case No. E570 of 2021**, have not been joined herein as parties, and the interests of justice and fair administrative action require that the said complainant be joined and is given an opportunity to be heard in these proceedings.

The Disposition

12. In light of the foregoing observations and findings, the *ex parte* Applicant's Chamber Summons dated 20th May 2021 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicant's Chamber Summons dated 20th May 2021 is certified urgent and is admitted to hearing *ex parte* in the first instance.

II. Beatrice Wairimu trading as Britine General Suppliers, Miriam Wanjiru Mwaura trading as One Plus Enterprise and Phoebe Wakiini Muita trading as Dreams Enterprise, the complainants in Milimani Chief Magistrates Criminal Case No. E570 of 2021 are joined in these proceedings as the 1st, 2nd and 3rd Interested Parties respectively.

III. The *ex parte* Applicant is granted leave to apply for an order of Certiorari to remove into the High Court and quash the 1st Respondents decision to prefer charges against the *ex parte* Applicant which decision is set out in the Charge Sheet dated 10th May 2021 and registered before the 2nd Respondent in Milimani Chief Magistrate's Criminal Case No. E570 of

2021.

IV. The *ex parte* Applicant is granted leave to apply for an order of Prohibition directed at the 1st Respondent, its officers and any other authority acting on its instructions from prosecuting or proceeding with the prosecution of the Applicant on the offence of obtaining goods by false pretences contrary to section 313 of the Penal Code in Milimani Chief Magistrate's Criminal Case No. E570 of 2021 or any other related charge.

V. The *ex parte* Applicant is granted leave to apply for an order of Prohibition directed at the 2nd Respondent prohibiting the 2nd Respondent from hearing, proceeding with or in any way entertaining Milimani Chief Magistrates Criminal Case No. E570 of 2021.

VI. The leave granted herein shall operate as a stay of any further proceedings in in Milimani Chief Magistrates Criminal Case No. E570 of 2021 and of any charges against the *ex parte* Applicant in the said criminal case, pending the hearing and determination of the substantive judicial review application herein or until further orders by this Court.

VII. The costs of the *ex parte* Applicant's Chamber Summons dated 20th May 2021 shall be in the cause.

VIII. The *ex parte* Applicant shall file and serve the Respondents and Interested Parties with the substantive Notice of Motion and submissions thereon, and shall also serve the Respondents and Interested Parties with the Chamber Summons dated 20th May 2021, a copy of this ruling, and a mention notice, within fourteen (14) days from today's date.

IX. Upon being served with the said pleadings and documents, the Respondents and Interested Parties shall be required to file their responses to the substantive Notice of Motion and submissions thereon within fourteen (14) days from the date of service by the *ex parte* Applicant.

X. This matter shall be mentioned virtually by video link on 6th July 2021 at 3.pm. for further directions.

XI. 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.

XII. All the parties shall file their pleadings 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.

XIII. 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.

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

XV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for virtual hearing on 6th July 2021 at 3.pm., and shall avail to the parties the electronic link for the hearing.

XVI. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant and Respondents by electronic mail by close of business on Friday, 21st May 2021.

XVII. Parties shall be at liberty to apply.

13. Orders accordingly.

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

P. NYAMWEYA

JUDGE