



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

JUDICIAL REVIEW APPLICATION NO. 31 OF 2019

GEORGE BUSH.....1ST APPLICANT

LAWRENCE OYUGI.....2ND APPLICANT

V E R S U S

REPUBLIC.....RESPONDENT

AND

JOHN WAMAGATA.....PROPOSED INTERESTED PARTY/APPLICANT

RULING

1. George Bush and Lawrence Oyugi (herein referred to as the “Applicants”) moved to this Court on 25th October 2020 through a Notice of Motion of even date purporting to seek leave to apply for Judicial Review orders and in particular, orders of mandamus under Articles 47 and 50 of the Constitution. The leave application which is not formally and procedurally filed as a Chamber Summons as required under Order 53 of the civil procedure rules is filed as Notice of Motion seeking orders;

- (1) That this application be certified as urgent and service thereof be dispensed with in the first instance.**
- (2) That this Honourable Court be pleased to annul/quash the conditions set by the Anti-Corruption and Economic Crimes Division of the High Court against H.E. Governor Ferdinand Waititu Babayao denying him access to his office until his criminal case is heard and determined.**
- (3) That this court be pleased to prohibit further criminal proceedings against H.E. Governor Ferdinand Waititu Babayao in the Anti-Corruption and Economic Crimes Division until he resumes office.**
- (4) That this Honourable Court be pleased to issue further orders and directions necessary to effect the forgoing orders and/or in favor of the cause of justice.**
- (5) That the costs of the application be awarded to the applicants.**

2. The application is premised upon grounds set out on the face of it, statement of facts and a replying affidavit sworn on 25th October 2019 by the applicants jointly.

3. The applicants who introduced themselves as renowned activists in Kenya championing the cause of justice under the umbrella of Concerned Citizens Alliance averred that they were seeking to protect the rights of their Kiambu Governor one Ferdinand Waititu Babayao whom they claimed was illegally and irregularly charged with 12 others before the Anti-Corruption Court.

4. According to them, the Respondent/DPP and by extension the state, blatantly violated rights of citizens living in Kiambu by charging their Governor. That the release of their Governor on bond on condition that he ceased accessing his office was unconstitutional and a violation of the electorate’s rights as the Governor was supposed to serve for an uninterrupted period of 5 years.

5. They further deposed that, the Governor having filed a **Revision Application No. 30/19** consolidated with **Revision Application No. 21/2019** before the High Court seeking to set aside the orders of the lower court barring him from accessing his office, and further, the High Court having dismissed the said application and instead upheld the lower court orders, this court has powers to quash those orders and allow the Governor to access his office.

6. In the applicants' view, the imposition of those terms did create political turbulence in Kiambu County as the Deputy Governor had already commenced reshuffling the County Executive Officers hence the need for this Court's intervention to return normalcy into the County.

7. Having perused the application which was originally filed before the Judicial Review Division, the duty Court in the said division certified it urgent and directed for service to be effected upon the respondent. The file was then transferred to this Division for hearing and determination.

8. In response, the DPP filed Grounds of Opposition dated 11th November 2019 stating that;

(1) The Applicants' application is frivolous, vexatious and otherwise an abuse of the court process and the same is not premised on any legal or factual basis and ought to be dismissed sua sponte.

(2) The application is a misconceived legal misadventure as the impugned order, the subject of this Judicial Review application was not issued by the Respondent herein and the Respondent therefore, cannot be subjected to the intended Judicial Review proceedings.

(3) The Applicants' application has not demonstrated in any way how the Respondent has threatened and or impugned the rights of the applicant to warrant the institution of Judicial Review proceedings.

(4) The intended Judicial Review application is a duplication of Judicial proceedings that is already pending before the Nairobi Court of Appeal, namely; Civil Appeal No. 416/2019 Ferdinand Ndungu Waititu Babayao v. Director of Public Prosecutions which is scheduled for a ruling on 20th December 2019.

(5) The application is brought for the sole purpose of unlawfully and unjustifiably embarrassing the Respondent herein.

9. Contemporaneously filed with the Grounds of Opposition is a Preliminary Objection in which the Respondent stated;

(1) That this Court lacks the requisite jurisdiction to entertain and/or grant the Judicial Review remedies sought by the Applicants as decisions and orders that emanate from the High Court cannot be subjected to Judicial Review proceedings.

(2) That there is a well elaborate procedure of challenging decisions and orders emanating from the High Court and that One Division of the High Court cannot review, revise or vary a decision of a comparable division of the High Court.

(3) The impugned order, the subject of this Judicial Review application, was not issued by the Respondent herein and therefore, the Respondent herein cannot be subjected to the intended Judicial Review proceedings.

10. On 6th May 2020, the Court directed that the Preliminary Objection be canvassed first as its disposition would have determined the status of the intended Judicial Review proceedings.

11. Despite the Court fixing several hearing dates for the purported application for leave to institute Judicial Review proceedings, the applicants did not turn up. Eventually, the Court directed for their service by way of Registered post through their last known address.

12. Having not attended Court as scheduled, the matter proceeded exparte. During the hearing, Mr. Nyamache counsel appearing for the Respondent (DPP) urged the Court to dismiss the suit as the DPP was irregularly sued as a party for actions committed by the High Court. Counsel relied on the grounds set out on their Preliminary Objection and urged the Court to dismiss the suit as being frivolous, an abuse of the court process and that orders complained of were appealed against by the Governor and the Court of Appeal dismissed the appeal in **Civil Appeal No. 416/2019** on 20th December 2019.

Analysis and Determination

13. From the onset, I wish to state that, what is before Court is perse not an application for leave to institute Judicial Review proceedings in the strict sense of the word under Order 53 of the Civil Procedure Act. The Applicants who filed this suit in person simply stated in one sentence as a title in the following words;

“AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW FOR ORDERS OF MANDAMUS UNDER ARTICLES 47 AND 50 OF THE CONSTITUTION.”

14. Following those words is a list of constitutional provisions alleged to have been violated by the Respondent and their substantive Notice of Motion which ordinarily ought to have been filed after leave is granted.

15. Having gone through the pleadings herein by the applicants and the Respondent's response, the following issues arise for determination

(a) **Whether there is a properly filed application for Judicial Review.**

(b) **Whether the purported application for leave to institute Judicial Review proceedings is bad in law, an abuse of the court process and therefore not sustainable.**

16. The law governing Judicial Review proceedings is Order 53 of the Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act. Order 53 Rule 1 Sub-Rule (1) provides that;

“No application for an order of mandamus, prohibition, or certiorari shall be made unless leave therefore has been granted in accordance with this rule.

Sub-Rule 2 - An application for such leave as a foresaid shall be made ex parte to a judge in chambers and shall be accompanied by a statement, setting out the name and description of the applicant, the reliefs sought and the grounds on which it is sought, and by affidavits verifying the facts.”

17. The law is therefore clear that, a substantive motion seeking for Judicial Review orders can only follow if leave has been granted upon the applicants proving that they have an arguable case – **See Republic v. Land Disputes Tribunal Central Division and Another Ex parte Nzioka (2006) IEA 32**, where the Court held that;

“Leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave, and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest opportunity possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralyzed for months because of pending court action which might turn out unmeritorious.”

18. It is trite law that leave is not automatic. Certain conditions must be met among them, the suit must be arguable and not hopeless or frivolous (**See Justus Ongera v. Director of Public Prosecution and Another (2018)eKLR**).

19. In the instant case, there is no formal application nor verifying affidavit to support the facts of the case. The application does not even have the impugned orders of the High Court that are being challenged. There is no proof by way of evidence that there exists an adverse order made against the Governor of Kiambu or the Applicants themselves. In the absence of a substantive application or a verifying affidavit in support, this court is not in a position to ascertain and verify the nature of the claim against the Respondent. Order 53(2) of the Civil Procedure Rules is couched in mandatory terms. Rules of procedure must be adhered to if courts are to achieve any meaningful dispensation of justice. Although the applicants are lay persons, the mandatory rules governing their application cannot be ignored.

20. For the above reasons stated, the substantive Notice of Motion dated 25th October 2019 is improperly before the Court as it was filed before leave is granted. Since there is no formal application filed by way of ex parte Chamber Summons, this Court cannot act by granting leave in the vacuum. In real sense, the court ought to have dismissed the purported application suo motto without ordering for service. In other words, the suit herein and the intended judicial review proceedings are frivolous and hopeless and therefore does not deserve any attention or further consideration.

Whether the purported application for leave to institute Judicial Review proceedings is bad in law, an abuse of the court process and therefore not sustainable

21. The crux of the Preliminary Objection is that the suit against the DPP is misplaced as there is no cause of action against the DPP. This is confirmed from the fact that the impugned orders of the intended Judicial Review proceedings arose out of a lawful court order barring the then Kiambu County Governor from accessing his office during the pendency of his corruption charges. On that ground alone, the DPP contended that the suit is bad in law as there is no cause of action against him considering that the orders complained of did not arise out of his official duties or action.

22. What then constitutes a cause of action? In the case of **Pius Kimayio Langat v. Co-operative Bank of Kenya Limited (2017)eKLR** the Court of Appeal defined a cause of action as:-

“A cause of action is a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

23. In the instant case, the DPP has been sued on grounds that the Anti-Corruption High Court decision did dismiss a Revision Application No. 30/19 filed by the then Kiambu County Government Governor Ferdinand Waititu Babayao who had been charged of Anti-Corruption charges before the lower court and then barred from accessing his office. Indeed, the decision by the High Court cannot attract a Judicial Review order from this Court. The best course of action was to appeal against the decision of the High Court to the Court of Appeal which the Governor as the aggrieved party and accused person properly did by filing appeal No. 416/19. The said appeal was on 20th December 2019 dismissed by the Court of Appeal thus upholding the decision of the High Court.

24. Although the decision of the Court of Appeal came after this suit had been filed technically rendering the same moot, the Applicant had no legal basis in the first place to sue the DPP for a lawful action taken by a Court of law issuing lawful orders. High Court orders cannot be subjected to Judicial Review proceedings before a Court of concurrent jurisdiction. The DPP was just but a party in the Anti-Corruption Revision Application No. 30/19. What wrong did he commit by participating in the proceedings? The impugned orders were not his. He cannot be held responsible or liable for court’s omissions or commissions.

25. For those reasons, it is my holding that there is no cause of action against the DPP and this court has no jurisdiction to hear and determine the claim. It is trite law that where a suit is bad in law or a Court lacks jurisdiction, then the Court must down its tools and dismiss the suit. In arriving at this finding, I am guided by the decision in the celebrated case of **Mukisa Biscuit Company v. West End Distributors Limited (1969)EA 696** at page 701 in which the Court stated that:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

26. I am in agreement with Mr. Nyamache that the suit before the Court is frivolous, bad in law and that this Court does not have jurisdiction to entertain the same as it is intended to challenge the decision of a Court of concurrent jurisdiction thus technically asking this court to sit as an appellate court over a colleague’s decision. Where a Court lacks jurisdiction like I do in this case, it should down its tools and move no more step. **See Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd (1989) KLR** where J. Nyarangi stated that;

‘I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’

27. It is apparent from the pleadings that the DPP had no role to play in the issuance of the Court orders complained of. I further take judicial notice of the fact that Ferdinand Waititu is no longer a Governor as he was kicked out of Kiambu leadership through an impeachment motion before the Senate and a new Governor is in office. The intended proceedings would be futile and an academic exercise.

28. Accordingly, I am satisfied that the Preliminary Objection herein is merited and that the same is upheld. The Applicants suit is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2020.

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J. N. ONYIEGO

JUDGE