



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E 1122 OF 2020

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

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

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

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

SUB COUNTY CRIMINAL INVESTIGATION

OFFICER SCCIO KAYOLE.....3RD RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATION

OFFICER DCIO KAYOLE POLICE STATION.....4TH RESPONDENT

THE OFFICER COMMANDING STATION

KAYOLE POLICE.....5TH RESPONDENT

THE CHIEF MAGISTRATES COURT

MAKADARA LAW COURTS.....6TH RESPONDENT

EX-PARTE APPLICANT:

SYMON THUO GACHAHI MUHIA

RULING

1. The *ex parte* Applicant herein, Symon Thuo Gachahi Muhia, has filed an application herein by way of a Chamber Summons dated 27th October 2020, seeking the following orders:

1 That the matter be certified urgent.

2 That the leave be granted for the applicant to apply for:

a) An order of judicial review of certiorari to remove into this court and quash as against the applicant herein the charges dated Wednesday 28th October 2020 intending to charge the applicant with the offence of obtaining money by false pretence contrary to section 313 of the Penal Code cap 63 Laws of Kenya, in the Chief Magistrates Court Makadara.

b) An order of Judicial Review of Prohibition directed towards the respondent prohibiting them from illegally and unprocedurally prosecuting or continuing with the criminal proceedings against the applicant in the Chief Magistrates Court at Makadara or any other criminal court.

3 That the leave so granted to operate as a stay of the proceedings, against the applicant herein, pending before the Chief Magistrate Court Makadara.

4 That the cost of the application be provided for.

2. The said application is supported by a statutory statement dated 27th October 2020, and a verifying affidavit sworn on the same date by the *ex parte* Applicant. The main ground for the application is that the *ex parte* Applicant, who is an advocate of the High Court of Kenya, has been acting for Kamuingi Housing Company Limited, and has been assisting the Registrar of Companies to identify the bona fide shareholders of the said company pursuant to orders given in HCCC No. 235 of 2013 - Kamuingi Housing Company Limited vs The Registrar of Companies & Another. However, that the directors of the said Company have initiated the prosecution against him to intimidate, harass and silence him.

3. The *ex parte* Applicant annexed copies of correspondence on the intended prosecution, and of orders given in HCCC No. 235 of 2013 - Kamuingi Housing Company Limited vs The Registrar of Companies & Another.

The Determination

4. I have considered the application dated 27th October 2020 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.

5. 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) 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, however, that the test is flexible depending on the nature and gravity of the issues.

6. In the present application, the *ex parte* Applicant has provided evidence of intended prosecution, and 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 of mandamus against the Respondent.

7. 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.”

8. In R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127, 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. 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.

9. It has in this regard been held that were 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.

10. See in this regard 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.

11. I note in this regard that the *ex parte* Applicant has not provided any evidence of the charges made against him or pending proceedings in the Chief Magistrate's Court in Makadara which he seeks to stay. It is thus the view of this Court that the order sought of stay is premature and not merited. In addition, in the circumstances of this application the interests of justice would be better served and there would be no prejudice occasioned if instead of the stay order, the substantive application proceeds to hearing expeditiously.

The Orders:

12. In the premises the Chambers Summons application dated 27th October 2020 is allowed to the extent of the following orders:

- I. The Chambers Summons application dated 27th October 2020 is certified urgent and admitted to hearing *ex parte*.
- II. The *ex parte* Applicant is granted leave to apply for an order of judicial review of certiorari to remove into this court and quash as against the applicant herein the charges dated Wednesday 28th October 2020 intending to charge the applicant with the offence of obtaining money by false pretence contrary to section 313 of the Penal Code Cap 63 Laws of Kenya, in the Chief Magistrates Court Makadara.
- III. The *ex parte* Applicant is granted leave to apply for an order of judicial review of prohibition directed towards the Respondents prohibiting them from illegally and unprocedurally prosecuting or continuing with the criminal proceedings against the applicant in the Chief Magistrates Court at Makadara or any other criminal court.
- IV. The prayer that the leave so granted operates as a stay of the proceedings against the applicant herein pending before the Chief Magistrate Court Makadara is declined
- V. The costs of the Chamber Summons dated 27th October 2020 shall be in the cause.
- VI. The *ex parte* Applicant shall file the substantive Notice of Motion, and shall serve the Respondents with (i) the Chamber Summons application dated 27th October 2020, (ii) the substantive Notice of Motion and submissions thereon, (iii) a copy of this ruling, and (iii) a mention notice, within twenty-one (21) days from today's date.
- VII. Upon being served with the said pleadings and documents, the Respondents shall be required to file their responses to, and submissions on the substantive Notice of Motion within twenty-one (21) days from the date of service.
- VIII. This matter shall be mentioned on 20th January 2021 to confirm compliance and for further directions.
- IX. 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.
- X. 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.
- XI. 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.
- XII. The parties shall also be required to file and send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to judicialreview48@gmail.com with copies to asunachristine51@gmail.com.
- XIII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 20th January 2021.
- XIV. 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 Thursday, 29th October 2020.
- XV. Parties shall be at liberty to apply.

13. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 28th DAY OF OCTOBER 2020

P. NYAMWEYA

JUDGE