



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 109 OF 2020**

**IN THE MATTER OF AN APPLICATION FOR LEAVE FOR**

**JUDICIAL REVIEW ORDERS OF CERTIORARI**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**EX PARTE APPLICANT: EDWARD SAMUEL NGUGI**

**RULING**

1. This ruling is on the application by way of a Chamber Summons dated 21<sup>st</sup> May, 2020 by the *ex parte* Applicant herein, Edward Samuel Ngugi (hereinafter referred to as “the Applicant”). The Applicant is seeking the following outstanding orders in the said application: -

a) **THAT leave be granted to the ex-parte Applicant to apply for Judicial review order of Certiorari to remove to this Court to quash the proceedings of Criminal Case No. 3105 of 2017 at the Chief Magistrates Court at Thika commenced against the ex-parte Applicant.**

b) **THAT leave granted herein do operate as stay of all the proceedings in Criminal Case No. 3105 of 2017 at the Chief Magistrates Court at Thika, to the extent of the ex- parte Applicant pending the hearing and determination of this application and the Notice of Motion hitherto.**

c) **Costs be provided for.**

2. The application is supported by a statutory statement dated 21<sup>st</sup> May 2020, and a verifying and supplementary affidavit sworn by the Applicant on 21<sup>st</sup> May, 2020 and 23<sup>rd</sup> July, 2020 respectively. The Respondent filed Grounds of Opposition dated 28<sup>th</sup> August, 2020 opposing the application, and also filed a replying affidavit sworn on 24<sup>th</sup> September, 2020 by Corporal Zablon Atubwa, a police officer serving in the Directorate of Criminal Investigations and involved in the investigations of the subject criminal matter. A summary of the parties' respective cases is set out in the following sections.

**The Applicant's case**

3. The Applicant averred that he was arrested together with one James Thendu Gitau, and arraigned in court for prosecution on matters that are purely of a civil nature by the Respondents in Criminal Case No. 3105 of 2017 at Thika Chief Magistrates Courts. He stated that the parcel of land known as RUIRU KIU/BLOCK 2/(GITHUNGURI) 3758 which is the subject of the criminal proceedings was the subject of civil suits at the Chief Magistrates Court at Thika Civil Case No. 879 of 2015 and E.L.C. Case No. 234 of 2017, that have since been concluded and judgment made in favour of one Livingstone Wanyoike Kinyanjui. Further, that the same subject matter was canvassed in NRB H.C. Judicial Review Appl. No. 420 of 2018, wherein Justice Mativo granted an order Certiorari to quash the proceedings of Criminal Case No. 3104 of 2017 at Chief Magistrate's Court at Thika, as concerns James Thendu Gitau .

4. The Applicant averred that Criminal Case No. 3105 of 2017 at the Chief Magistrates Court at Thika amounts to an abuse of the criminal justice system to settle both known and unknown personal scores, and it is therefore in the interests of justice that the prayers for leave and

stay are granted. The Applicant also filed skeletal submissions dated 23<sup>rd</sup> July, 2020 in support of the Chamber Summons application, wherein the above arguments were reiterated, and in which he relied upon, and extensively cited sections of the judgment by Mativo J. in Judicial Review Misc. Application No. 420 of 2018.

### **The Respondent's case**

5. The Respondent opposed the application on the grounds that the prayers sought by the Applicant are unconstitutional, as they seek to prevent the Respondent from exercising its mandate as provided under Article 157 of the Constitution, and insufficient evidence has been adduced to show that the criminal proceedings in Criminal case No. 3105 of 2017 at the Chief Magistrates Court at Thika are mounted for an ulterior purpose or to demonstrate how the Respondent acted without or in excess of its powers. Further, that the Applicant has failed to demonstrate how the specific rights stated in his application have been or will be infringed, violated, or threatened by the Respondent if the criminal proceedings proceed.

6. The said deponent in addition averred that on 8<sup>th</sup> August, 2017, one Margaret Njeri Kamau lodged a complaint vide OB Number 36/8/5/2017, alleging that a person identified as Edward Samuel Ngugi, the Applicant herein, had falsely obtained land registration for land parcel number Ruiru Block 2/Githunguri/3758 in his name and sold it. Further, the deponent stated that the said Edward Samuel Ngugi was not known to the complainant, and that upon receiving the complaint, they interviewed and recorded the complainant's statement and launched investigations into the matter. He detailed the investigations undertaken and evidence availed, including a Share Certificate Number 0622 dated 16<sup>th</sup> June, 1994 in the name of the Applicant, which is suspected to be a forgery.

7. The Respondent contended that the criminal proceedings were commenced against the Applicant in Criminal Case Number 2586 of 2017 and later consolidated with Criminal Case Number 3105 of 2017 against one James Thendu Gitau on 20<sup>th</sup> November 2017. Further, that the proceedings in Criminal Case Number 3105 of 2017 were quashed through an order of Certiorari in Judicial Review Miscellaneous Civil Application No. 420 of 2018, resulting in the release of James Thendu Gitau, while upholding the criminal proceedings against the Applicant. Therefore, that the current existing file in this matter is Criminal Case Number 2586 of 2017 against the Applicant herein, who is a stranger to the proceedings in Criminal Case Number 3105 of 2017.

8. The Respondent also averred that the Applicant has not been discriminated against in any form, neither is he being victimized, and that he has been given the right to be heard which process can only be achieved through a court process. It was further contended that the prosecution of the Applicant is in compliance with law and that the trial process is an avenue for the Applicant to defend himself on the allegations made against him. Further, that the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges. In conclusion, the Respondent stated that should the court be inclined to grant leave, the same should not operate as a stay of the proceedings in Criminal Case Number 2586 of 2017.

### **The Determination**

9. I have considered the application dated 21<sup>st</sup> May, 2020 and the applicable law for leave to commence judicial review proceedings, which is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court is sought and granted. 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.

10. It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it, and make a decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was 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.

11. In the present application, the Applicant has provided evidence of the impugned charges brought against him, as well as the judgments delivered by the Chief Magistrate's Court at Thika Civil Case No. 879 of 2015, and by Hon. Mr. Justice Mativo in NRB H.C Judicial Review Applications No. 42 and No. 420 of 2018. To this extent I find that the Applicant has demonstrated viable grounds, and his application meets the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondent.

12. 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.”**

13. 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.

14. The main factor is whether or not the decision or action sought to be stayed has been fully implemented. It was thus held in **Jared**

**Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. A similar decision was made by Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** .

15. This factor was also discussed in **R (H). vs Ashworth Special Hospital Authority (supra)** where Dyson L.J. held as follows:

**“As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.”**

16. It therefore follows 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.

17. In this regard, the criminal proceedings against the Applicant have not been completed and are therefore amenable to stay. In addition, this Court needs time to peruse the various pleadings and judgments relied upon, and the Applicant’s application may thus be rendered nugatory if stay orders are not granted.

18. This Court however noted that the complainant in the criminal case has not been joined herein as a party, 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 Orders**

19. In light of the foregoing observations and findings, the Applicant’s’ Chamber Summons dated 21<sup>st</sup> May 2020 is found to be merited to the extent of the following orders:

**I. The complainant in Thika Chief Magistrates Court Criminal Case No. 3105 and 2586 of 2017 is joined in these proceedings as an Interested Party.**

**II. The *ex parte* Applicant is granted leave to apply for Judicial Review order of Certiorari to remove to this Court to quash the proceedings commenced against him in Criminal Case No. 3105 of 2017 and Criminal Case No. 2586 of 2017 at the Chief Magistrate’s Court at Thika.**

**III. The leave granted herein shall operate as stay of the proceedings against the Applicant in Criminal Case No. 3105 of 2017 and Criminal Case No. 2586 of 2017 at the Chief Magistrates Court at Thika, pending the hearing and determination of the substantive Notice of Motion or until further orders of this Court.**

**IV. The Applicant shall file and serve the Respondent and Interested Party with (i) the substantive Notice of Motion, (ii) the Chamber Summons dated 21<sup>st</sup> May 2020, (iii) a copy of this ruling, and (iv) a hearing notice, within twenty-one (21) days from today’s date.**

**V. Upon being served with the said pleadings and documents, the Respondent and Interested Party shall be required to file their responses to the substantive Notice of Motion within twenty-one (21) days from the date of service.**

**VI. 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 substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.**

**VII. 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](mailto:judicialreview48@gmail.com) and [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).**

**VIII. 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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).**

**IX. 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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).**

**X. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division’s causelist for hearing on 2<sup>nd</sup> February 2021.**

**XI. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the Applicant and Respondent by**

electronic mail by close of business on Thursday, 3<sup>rd</sup> December 2020.

**XII. Parties shall be at liberty to apply.**

20. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF NOVEMBER 2020**

**P. NYAMWEYA**

**JUDGE**

**FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING**

**In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this ruling will be delivered electronically by transmission to the email addresses of the Applicant's and Respondent's Advocates on record.**

**P. NYAMWEYA**

**JUDGE**