



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. E083 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND ROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

CHIEF MAGISTRATE'S COURT AT MILLMANI.....3RD RESPONDENT

AND

FREDRICK GITAHU GETHENJI.....INTERESTED PARTY

EX PARTE: JAMES NDUNGU GETHENJI

RULING

The Application

1. James Ndungu Gethenji, the *ex parte* Applicant herein, has filed an application by way of a Chamber Summons dated 23rd December 2020, seeking the following orders:

1. This application be and is hereby certified urgent and heard ex parte in the first instance.

2. Leave be granted to the Applicant to commence judicial review proceedings for an order of Certiorari, to quash the Charge Sheet in Criminal Case No. E3934 of 2020 registered against the Applicant, before the Chief Magistrate's Court at Milimani, on charge of forgery contrary to Section 345 as read with Section 349 of the Penal Code;

3. Leave be granted to the Applicant to commence judicial review proceedings for an order of Prohibition, to prohibit the Respondents from charging the Applicant with the impugned offence before the Chief Magistrates Court at Milimani or any other Court in the Republic or to register any charge sheet of a similar offence or from same transaction before any Court in the Republic or to sustain any proceedings thereto.

4. The leave granted do operate as stay of proceedings in Criminal Case No. E3934 of 2020 registered against the Applicant, before the Chief Magistrate's Court at Milimani, on charge of forgery contrary to Section 345 as read with Section 349 of the Penal Code, stay of any charge sheet registered against the Applicant before the said Court, stay of any criminal proceedings commenced pursuant thereto .

5. The costs of this Application be provided for .

2. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 23rd December 2020, and a verifying affidavit sworn on the same date by the *ex parte* Applicant.

3. In summary, the main grounds are that the *ex parte* Applicant is the Chairman and Director of Kihingo Village Management One Limited in which company his co shareholder is Fredrick Gethenji who is his brother and complainant in the subject criminal case. Further, that the Respondents have sought to charge the Applicant with the offense of forging minutes of the Company to make one Chacha Mabanga a director of the Company, yet the complainant had sued the *ex parte* Applicant in **NRB HC Comm Civil Case No. 229 of 2019**, in which he made the same allegation and the Court found that there was no evidence that the *ex parte* Applicant had forged the said minutes.

4. The *ex parte* Applicant therefore claims that the Complainant is abusing the criminal justice system to harass and intimidate the Applicant as part of an on going family dispute regarding sharing and administration of the assets of their late father.

5. The *ex parte* Applicant in this respect annexed copies of the charge sheet in **Criminal Case No. E3934 of 2020**, and of the pleadings and judgment delivered in **NRB HC Comm Civil Case No. 229 of 2019**.

The Determination

6. I have considered the application dated 23rd December 2020 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicant has demonstrated that this matter is urgent. This for reason that the subject charges are likely to affect the *ex parte* Applicant's rights and liberty.

7. On the orders sought by the *ex parte* Applicant for leave to commence judicial review proceedings, the applicable law 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 was 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.

8. 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 a 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 in this respect 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.

9. In the present application, the *ex parte* Applicant has provided evidence of the charges brought against him and of the previous civil suit he had with the Interested Party on the same subject matter, and has averred as to the grounds and reasons why it considers the charges against him to be improper. 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.

10. 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.”

11. 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.

12. 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** .

13. 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.”

14. 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.

15. In this regard, the charges against the *ex parte* Applicant require certain actions of a continuing nature to be taken by the Respondents and Interested Party in relation to their prosecution, and the said charges are therefore amenable to stay. In addition, if stay orders are not granted, the *ex parte* Applicant's application will be rendered nugatory. The stay orders are merited to this extent.

The Orders

16. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 23rd December 2020 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants' Chamber Summons application dated 23rd December 2020 be and is hereby certified as urgent, and is hereby admitted for hearing *ex parte*.

II. The *ex parte* Applicant is granted leave to apply for an order of Certiorari to quash the Charge Sheet in Criminal Case No. E3934 of 2020 registered against the Applicant, before the Chief Magistrate's Court at Milimani, on charge of forgery contrary to Section 345 as read with Section 349 of the Penal Code.

III. The grant of leave herein shall operate as a stay of criminal proceedings against the *ex parte* Applicant in Criminal Case No. E3934 of 2020 before the Chief Magistrate's Court at Milimani, on charge of forgery contrary to Section 345 as read with Section 349 of the Penal Code, pending the hearing and determination of the substantive judicial review application herein or until further orders by this Court.

IV. The costs of the *ex parte* Applicants' Chamber Summons application dated 23rd December 2020 shall be in the cause.

V. The *ex parte* Applicant shall file and serve the Respondents and Interested Party with (i) the substantive Notice of Motion, (ii) the Chamber Summons dated 23rd December 2020 and its supporting documents, (iii) a copy of this ruling, and (v) a hearing notice, within fourteen (14) days from today's date.

VI. Upon being served with the said pleadings and documents, the Respondents and Interested Party shall be required to file their responses to the substantive Notice of Motion within fourteen (14) days from the date of service.

VII. The hearing of the substantive Notice of Motion shall be held on 4th February 2021.

VIII. 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.

IX. 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.

X. 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.

XI. 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.

XII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 4th February 2021.

XIII. 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, 28th December 2020.

XIV. Parties shall be at liberty to apply.

17. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF DECEMBER 2020

P. NYAMWEYA

JUDGE