



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC CIVIL APPLICATION CASE NO. 1 OF 2017 (JR)

**IN THE MATTER OF: APPLICATION BY NICKSON OCHARO OGUTA FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW (CERTIORARI & PROHIBITION)**

AND

IN THE MATTER OF: LAW OF CONTRACT ACT, CHAPTER 23, LAWS OF KENYA

AND

**IN THE MATTER OF: CRIMINAL PROSECUTION RELATING TO THE COLLAPSE OF A
STOREY BUILDING STANDING ON LR NO. KISII MUNICIPALITY/BLOCK III/236**

AND

IN THE MATTER OF: KISII CMCR NO. 3347 OF 2016

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACT, 2015

AND

**IN THE MATTER OF: ARTICLES 2 (2), 23, 27 (1), 29 (A), 48, 50 (1), 165 & 258 OF THE
CONSTITUTION, 2010**

BETWEEN

JEFF NICKSON OCHARO OGUTA.....APPLICANT

VERSUS

THE DISTRICT CRIMINAL INVESTIGATIONS OFFICER, KISII

THE DIRECTOR OF CRIMINAL INVESTIGATIONS

THE INSPECTOR GENERAL

THE DIRECTOR OF PUBLIC PROSECUTIONS

THE CHIEF MAGISTRATE'S COURT, KISII LAW COURTS.....RESPONDENTS

RULING

1. Through an ex-parte chamber summons application filed on 6th February, 2017 and expressed to have been brought under **Order 53 Rule 1 and 2 of the Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act Cap 26**, the ex-parte applicant herein, Jeff Nickson Ocharo Oguta, sought the following prayers:

a) Spent.

b) **The Honourable Court be pleased to grant leave to the Applicant to apply for an Order of Judicial Review, in the nature of *Certiorari* to issue to remove unto the High Court and Quash the Charge Sheet and Proceedings in respect of and/or pertaining to Criminal proceedings vide KISII CMCR NO. 3347 OF 2016, together with any consequential Orders between REPUBLIC –VS- JEREMIAH MATOKE NYANGWARA AND JEFF NICKSON OCHARO OGUTA, more particularly, the charges and/or portions relating to the latter (*hereinafter referred to as the 2nd Accused Person*), wherein the Applicant has (sic) been charged with various offences pertaining to the collapse of the Building hitherto standing and/or constructed on LR NO. KISII MUNICIPLITY/BLOCK III/236.**

c) **The Honourable Court be pleased to grant leave to the Applicant to apply for an Order of Judicial Review in the nature of prohibition, to issue to prohibit the 1st, 2nd, 3rd and 4th Respondents from further preferring and/or maintaining the criminal Charges vide KISII CMCR NO. 3347 OF 2016, together with any consequential Orders, between REPUBLIC VS JEREMIAH MATOKE NYANGWARA AND JEFF NICKSON OCHARO OGUTA, more particularly, the charges and/or portions relating to the latter (*hereinafter referred to as the 2nd Accused Person*), whatsoever and/or howsoever.**

d) **The Honourable Court be pleased to grant leave to the Applicant to apply for an Order of Judicial Review in the nature of Prohibition, to issue to prohibit the 5th Respondent from entertaining, further entertaining, proceeding with, deliberating upon, rendering any decision on and/or any other manner handling the criminal Proceedings vide KISII CMCR NO. 3347 OF 2016, together with any consequential Orders, between REPUBLIC VS JEREMIAH MATOKE NYANGWARA AND JEFF NICKSON OCHARO OGUTA, more particularly, the charges and/or portions relating to the latter (*hereinafter referred to as the 2nd accused Person*), whatsoever and/or howsoever.**

e) **Leave so granted by the Honourable Court, Do operate as an Order of Stay, staying the Hearing, Mention and/or Prosecution of the Criminal Proceedings vide KISII CMCR NO. 3347 OF 2016, together with any consequential Orders, between REPUBLIC VS JEREMIAH MATOKE NYANGWARA AND JEFF NICKSON OCHARO OGUTA, more particularly, the charges and/or portions relating to the latter (*hereinafter referred to as the 2nd Accused Person*), whatsoever and/or howsoever, pending the hearing and determination of the intended substantive Application for Judicial Review.**

f) **The Applicant be at liberty to apply to the Honourable Court for all necessary and/or consequential Orders that, the Honourable Court may deem fit to grant.**

g) **Costs of this Application do abide the substantive Application for Judicial Review.**

2. The said application was supported by the ex-parte applicant's affidavit, statement of facts, verifying affidavit together with grounds expressed on the face of the application.

3. Briefly, the applicant contends that he is a duly registered Graduate technician Engineer authorized to carry out construction works but that he was neither engaged or retained by one Jeremiah Matoke Nyangwara (*hereinafter, "The Proprietor"*) to supervise or oversee construction on LR NO. KISII

MUNICIPALITY/BLOCK III/236 (hereinafter referred to as the “**Suit Premises**”).

4. It is the ex parte applicant’s case that having had no contractual relationship with the proprietor of the suit premises, he cannot be charged on held culpable for the collapse of a building on the suit premises and that the charges that have been initiated against him before the Chief Magistrates court at Kisii being Kisii CMCR No. 3347 of 2016 are malicious, contravene public policy and are a violation of his right to equal protection as envisaged under **Article 27 of the Constitution**.

5. The ex parte applicant reiterates that the criminal prosecution against him are meant to vex, harass and/or intimidate him thereby necessitating the instant application in which he seeks leave to apply for Judicial Review in the nature of certiorari to remove into the High Court and Quash the charge sheet and proceedings in Kisii Cr. Case No. 3347 of 2016.

6. The ex parte applicant also seeks for leave to apply for orders of Judicial Review in the nature of prohibition to prohibit the 1st, 2nd 3rd and 4th respondents from further preferring and maintaining the said criminal charges and to prohibit the 5th Respondent from entertaining or further entertaining deliberating upon or rendering any decision in the said criminal proceedings.

7. I have considered the instant application, the accompanying statement of facts, verifying affidavit and the oral submissions made in court by Mr. Oguttu advocate on 20th February 2017. The application was not opposed by the respondents despite proper service.

8. The reasoning behind the requirement that leave be sought and obtained before an application to apply for orders for judicial review are obtained is to exclude frivolous or vexatious applications which may amount to abuse of the process of the Court or those applications that are statute barred. Leave should however be granted, if on the material availed to the court, without going into the matter in depth, it appears that there is an arguable case. Leave stage therefore serves the purpose of filtering out hopeless cases at the earliest opportunity thereby saving the pressure on the courts and needless expense the applicant would have incurred if a futile or malicious claims were to be allowed. Eliminating futile claims at a preliminary stage also prevents public bodies being paralysed for months on end because of pending court action which might eventually turn out to be unmeritorious. See **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993, Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321, Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353.**

9. As was held 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:**

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly 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. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially”.

10. See also **Meixner & Another vs. Attorney General [2005] 2 KLR 189.**

11. The yardstick for the grant of leave was however set by the Court of Appeal in **Mirugi Kariuki Vs.**

“The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power...the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter... It is not the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some of the person’s legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise the appellant’s legal rights or interests were affected. The applicant’s complaint in the High Court was that this was so and for that reason he sought leave of the court to have it investigated. It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant’s interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers... In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a prima facie case. For that, he should have been granted leave to apply for the orders sought.”

12. I am satisfied that the ex parte applicant has made out a good case for the granting of the orders sought. *From the onset*, the Applicant’s case is that he is being persecuted under the guise of a criminal prosecution. It is my view and I so find that the Applicant has established a prima facie case which warrants the grant of leave. As is the case with respect to leave, it is now trite law that the decision whether or not to grant a stay pursuant to leave is an exercise of judicial discretion which must be exercised judicially. The circumstances under which the Court may grant an order that the grant of leave do operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise can now be said to be settled. Where the decision sought to be quashed has been implemented leave ought not to operate as a stay. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**

13. Maraga, J (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** expressed himself as follows:

“As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction... In judicial review applications the Court should always ensure that the ex parte applicant’s application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act... A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.”

14. In the instant case, however, it is clear to me, considering the manner in which the instant application is framed, that the decision to prosecute the applicant has already been implemented and the criminal proceedings have already commenced. Under the above circumstances and in line with the above quoted decision in **George Philip Wekulo** case (supra), the leave granted cannot operate as a stay of a process that has already been initiated. Furthermore, the stage at which the criminal trial has reached was not stated in order to assist this court in determining if granting a stay will or will not prejudice the trial taking into account the fact that the applicant is not the only accused person in the case pending before the lower court. I am also alive to the fact that should the trial, which the applicant refers to as malicious proceed to its logical conclusion, the outcome of this application, if successful, may not be rendered nugatory or an academic exercise as this court has jurisdiction to quash the said proceedings at whichever stage they may have reached by the time a decision is made in this case. My humble view is that issuing orders to stay independent judicial proceedings pending before another court may not be warranted at this stage.

15. Consequently, I allow prayers, (b) (c) and (d) only of the chamber summons (ex-parte) dated 30th January, 2017. Leave is hereby granted to the Applicant to apply for the judicial review orders in terms of the prayers listed hereinabove. The said Application is to be filed and served within 10 days from the date of this ruling. Costs in the cause.

Dated, signed and delivered in open court this 27th day of February, 2017

HON. W. A OKWANY

JUDGE

In the presence of:

- N/A for the Applicant
- N/A for the Respondent
- Omwoyo: Court Clerk