



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 61 OF 2016

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT (CAP 26 LAWS OF KENYA)

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

KENYATTA UNIVERSITY.....1ST APPLICANT

STEPHEN NJOKA NYAGA.....2ND APPLICANT

JASPER MURIITHI KARANI.....3RD APPLICANT

ANDREW MUGAMBI.....4TH APPLICANT

VERSUS

WELLINGTON KIHATO WAMBURU.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

THE INSPECTOR GENERAL,

NATIONAL POLICE SERVICE..... 3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING ON LEAVE AND STAY

1. The applicants in this case are Kenyatta University, Stephen Njoka Nyaga, Jasper Muriithi Karani and

Andrew Mugambi. They seek from this court by their chamber summons dated 14th February 2017 and supported by statutory statement, verifying affidavit and annexures the following orders:-

1) Spent.

2) Leave to apply for Judicial Review order of certiorari removing to the High Court for purposes of quashing the letter dated 9th January 2017 together with the requisitions to compel the attendance of the 2nd, 3rd and 4th applicant at the Director of Criminal Investigation Headquarters, Serious Crimes Unit on 15th February 2017;

3) An order of certiorari removing to the High Court for the purposes of quashing in inquiry No. 120/2016 instituted by the 1st respondent Wellington Kihato Wamburu .

4) An order of prohibition directed against the respondents, prohibiting them through their agents, from proceeding with inquiry No. 120/2016 or in any manner investigating allegations of perjury purported arising from Miscellaneous Application No. 101/2016 Republic vs Kenyatta University & Another Exparte Wellington Kihato Wamburu.

5) That leave to apply do operate as a stay of the inquiry No. 120/2016 pending hearing and determination of this Judicial Review application.

6) Costs of the application.

2. The grounds upon which the application is predicated and as stipulated in the statutory statement and depositions in the verifying affidavit of Aaron Tanui the legal officer of the 1st applicant Kenyatta University are, in essence, that the exparte applicants lament that the respondents have commenced an inquiry into an alleged perjury on the part of the applicants which alleged perjury relates to judicial proceedings which are already concluded vide Judicial Review case No. 101/2016.

3. That the particulars of the alleged perjury have not been supplied to the applicants despite the respondent being requested to do so. Further, that the person who swore the affidavit in the JR 101/2016 and who was the 1st applicant's employee has never been summoned to be questioned regarding alleged perjury; and that none of the applicants herein who were respondents in the said Judicial Review proceedings swore any affidavit upon which perjury can be inferred.

4. It is also contended that in any event, the respondents herein had an opportunity to test the veracity of that affidavit by the deponent in JR 101/2016 and even issued a notice to cross examine the said deponent but did not do so hence lodging of a complaint against the applicants herein shows bad faith, improper motive and abuse of power on the part of the respondents.

5. The applicants therefore averred that they have a prima facie arguable case for consideration at the substantive stage and urged the court to grant them leave to apply.

6. On the prayer for stay, the applicants maintained that if stay is not granted, then these proceedings shall be rendered nugatory if successful. They reminded the court that the 2nd -4th respondents have not filed any reply to these proceedings.

7. It was contended that on 13th February 2017 the applicant's counsels wrote to the Director of Criminal Investigations about the conduct in the matter but that no response was forthcoming. The applicants relied on the cases of **Sylvana Mpabwanayo Ntaryamira V Allen Waiyaki Gichuhi & Another, JR 449/2015; Republic v Cabinet Secretary for Transport and Infrastructure & 5 others Exparte Kenya County Bus Owners Association(Through Paul G.Muthumbi Chairman) Samuel Njuguna Secretary, Joseph Kimiri Treasurer & 8 Others [2014] e KLR and James Opiyo Wandayi Vs Kenya National Assembly & 2 Others [2016] e KLR; Mirugi Kariuki Vs Attorney General CA 70/91.**

8. In their submissions made orally on 7th March 2017 echoing the grounds and depositions of Mr Tanui, only the 1st respondent Wellington Kihato who is the complainant in the impugned inquiry filed his replying affidavit to the chamber summons opposing the granting of leave and or stay of the inquiry which depositions his advocate adopted in his oral submissions on 7th March 2017.

9. According to the 1st respondent, he admits lodging a complaint with the Director of Criminal Investigations in October 2016 following the filing of an affidavit in reply by Professor Wangari Mwai Sworn on 10th May 2016 in **Republic vs Kenyatta University & Another exparte Wellington Kihato Wamburu**, claiming that there was plagiarism of the 1st respondent's PhD Thesis. He believes that the subject matter and summons are intended to establish the veracity of emails exchanged between parties and shed more light as the source, the author and veracity of matters touching on and affecting his PhD thesis at the 1st applicant's institution, otherwise the application by the applicants is premature, ill conceived and calculated to defeat due process and moreso, that the guilty are afraid is true to this application and that if leave and stay are granted, they would frustrate investigations since the investigators are not limited to proceedings in JR 101/2016. He urged the court to dismiss the application.

DETERMINATION

10. I have considered the exparte applicant's chamber summons, the statutory statement and verifying affidavit together with annexures. I have also considered the opposing replying affidavit by the 1st respondent and the parties' advocate's submissions for the grant of the application for leave and grant of stay, and the authorities cited.

11. The question of whether or not to grant leave to institute Judicial Review proceedings pursuant to Order 53 of the Civil Procedure Rules is an exercise of judicial discretion and which discretion must be exercised judiciously and based on sound established principles (See **Sylvana Mpabwanayo Ntanyamira vs Allen Waiyaki Gichuhi & Another** (supra).

12. In granting leave, the court must be satisfied that the application is not frivolous, is not statute barred and therefore that it is not an abuse of the court process. The court at the leave stage, is however, not supposed to delve into the depths of the merits of the complaint intended to be investigated by way of judicial review proceedings as that would amount to determining the main motion thereby prejudicing the parties' positions. What is required of the applicant(s) therefore is to demonstrate that it (they) have an arguable prima facie case. The court must however, at the leave stage be cautious to ensure that its jurisdiction is not invoked to determine the merits of the decision making process or to act as an appellate court. Where it is apparent that the intended application is seeking to challenge the merits of the administrative or quasi-judicial body or authority, the court would hesitate to grant leave.

13. In addition, where the court is persuaded that there are other available efficacious remedies or forum for ventilating the grievance by the applicants, the court would not be generous in granting leave to apply for judicial review remedies of certiorari, mandamus and prohibition.

14. Judicial Review remedies though constitutionally guaranteed, they remain discretionary in nature and therefore they are remedies of the last resort where there is no other efficacious remedy. The court in granting leave and ultimately, the orders sought must satisfy itself that there is reasonable basis to justify the orders sought (see **Republic v County Council of Kwale & Another Exparte Kondo & 97 Others Mombasa HCC Miscellaneous Application No. 384/96; Permanent Secretary Ministry of Planning & National Development Exparte Kaimenyi (2006) 1EA 353.**

15. In the instant case, the exparte applicants claim that the dispute between them and the 1st respondent was resolved vide JR 101/2016 wherein the decision of the 1st applicant University to suspend the 1st respondent for examination irregularities was quashed and the University given 14 days to commence disciplinary proceedings in accordance with the law, against the 1st respondent herein and in

default, the order of mandamus compelling it to release his examination on his PhD thesis for Doctor of Philosophy Degree in Management Science submitted on 20th March 2015 be issued or takes effect.

16. It is contended that the respondents cannot purport to inquire into affidavits filed in JR 101/2016 as the 1st respondent had an opportunity to cross examine the deponent thereof and if there was any perjury as alleged, it would have been determined in those proceedings and not vide separate proceedings. The applicants read mischief, abuse of power and bad faith on the part of the respondents.

17. The investigating authority who issued summons to the applicants to appear for interrogation has not challenged the above allegations. However. The 1st respondent who is the complainant claims that it is in order for the Director of Criminal Investigation to investigate what he considers perjury by the applicants and that the investigations are not limited to JR 101/2016.

18. From the above rival positions, I am satisfied that the applicants have an arguable prima facie case for consideration indepth at the substantive hearing, and that they have not advanced a frivolous claim. I would in the circumstances grant the applicants leave to institute Judicial Review proceedings to challenge the decision by the Director of Criminal Investigation through its letter dated 9th January 2017; the inquiry No.120/2016 instituted by the 1st respondent on the alleged perjury of the applicants arising from HC Miscellaneous JR 101/2016 as prayed for in prayer No.2(a),(b) and (c)of the chamber summons.

19. This is not to say that the substantive motion must succeed but that there are arguable issues raised touching on determined proceedings which this court must investigate into to establish whether the decision(s) by the respondents are legal, regular, rational/reasonable and or procedurally proper. By granting leave, the court will be according the applicants an opportunity to ventilate their grievances and to accessing justice.

20. On the prayer for stay, the applicants complain that unless stay is granted, the substantive motion if successful, will be rendered nugatory.

21. The court notes that the letter dated 9th January 2017 from the Director of Criminal Investigations to the applicants through the legal officer of the 1st applicant Kenyatta University calls on the applicants to proceed to the Director of Criminal Investigations to record statements and clarify on the emerging issues arising from Miscellaneous Application 101/2016 and urges the 2nd, 3rd and 4th applicants to report to the Director of Criminal Investigations Headquarters Serious Crimes Unit on 15th February 2017 at 10.a.m. The letter also annexes a requisition to compel attendance form under Section 52(1) of the National Police Service Act, 2011, and warns that failure to report constitutes an offence and one can be liable to imprisonment punishable under the said Section.

22. The decision whether or not to grant stay pursuant to the leave granted above is an exercise of judicial discretion having regard to the circumstances of each case.

23. As stipulated in Order 53 Rule 1(4) of the Civil Procedure Rules, “ *the grant of leave under the rule to apply for an order of prohibition or an order of certiorari shall, if the judge so direct, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.*”

24. From the above provision, the court granting leave has wide discretion to grant or to decline to grant stay of the implementation of the impugned decision, where the decision has not been implemented fully. See **George Phillip Wekullo V The Law Society of Kenya & another kak HC Miscellaneous 29/2005.**

25. The court is also cautioned that in an application for leave to apply for Judicial Review and for stay, it has to be careful in what it states lest it touch on the merits of the main application for Judicial

Review. Therefore, where the outcome of the Judicial Review might be contrary to the conclusion reached by the body or person whose decision is being challenged, stay of proceedings should be granted as it might lead to an awkward situation or foist upon the court a state of hopelessness where it finds that a decision which ought not to have been made had been concluded. See **Jared Benson Kangwana V Attorney General Nairobi HCC 446/1996, Taib Ali Taib v The Minister for Local Government & Others Mombasa HC Miscellaneous Application 158 of 2006** where Maraga J (as he then was) held, inter alia:

“.....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 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.....”

26. Stay of implementation of the impugned decision is not automatic. Even where the court grants leave to apply for Judicial Review orders, it may decline stay. However, for good administration, in the present case, I am satisfied that owing to the nature of the decision and the challenge thereto, if stay is declined, the Director of Criminal Investigations will proceed and complete the inquiry relating to proceedings determined by a court of competent jurisdiction thereby allowing the Director of Criminal Investigations to jump into the arena of a court and even an appellate court, before the Judicial Review proceedings are heard and determined. In saying so, this court is alive to the statutory powers of the Director of Criminal Investigations under Section 24 of the National Police Service Act which powers are nonetheless not absolute. They are subject to the law and the Constitution hence where there is a serious allegation of arbitrariness or abuse of power, this court must halt the process until the merit of the allegations is fully investigated by the court exercising supervisory jurisdiction over judicial and quasi-judicial bodies/persons or authority.

27. It is for the above reasons that I exercise my discretion and order that the leave herein granted shall operate as stay of implementation of the decision of the Director of Criminal Investigations dated 9th January 2017 requiring the applicants to record any statements respecting inquiry No. 120/2016 relating to HC Miscellaneous Application No. 101/2016 until the Judicial Review proceedings once filed are heard and determined inter partes. The main motion to be filed and served within 21 days from to date. Mention on 10/5/2017 to confirm compliance and for directions.

28. Costs shall be in the caus

Dated, signed and delivered in open court at Nairobi this 28th day of March 2017.

R.E. ABURILI

JUDGE

In the presence of

Mr Mwangi for applicants

Miss Machinda h/b for Oduor for 1st respondent

N/A for all other respondents

CA: George