



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

JUDICIAL REVIEW MISC.APPLICATION NO.183 OF 2016

IN THE MATTER OF ORDER 53 RULE 1 AND 2 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF ARTICLES 47,48,50 159,160,AND 165(6) OF THE CONSTITUTION

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT,2015

AND

IN THE MATTER OF THE COMPANIES ACT NO. 17 OF 2015

AND

IN THE MATTER OF JOMAX CONSULTANTS LIMITED

**IN THE MATTER OF MAVOKO PRINCIPAL MAGISTRATE'S COURT MISC.
APPLICATION NO 20 OF 2016, FREDRICK NTHUMO NAINGI VS OFFICER IN CHARGE OF
CID MLOLONGO, JONES MAKAU MUTISYA AND NAOMI NTHENYA**

JONES MAKAU NTHENYA.....1ST APPLICANT

NAOMI NTHENYA.....2ND APPLICANT

VERSUS

THE PRINCIPAL MAGISTRATE COURT MAVOKO.....1ST RESPONDENT

FREDRICK NTHUMO MAINGI.....2ND RESPONDENT

JUDGMENT

The Application

The Applicants herein were granted leave on 30th August 2016 to commence judicial review proceedings, and subsequently filed their substantive application for judicial review orders herein by way of a Notice of Motion dated 23rd September 2016, in which they are seeking the following orders:

1. An order of certiorari to remove into the High Court for the purpose of its being quashed the ruling and order made by the Principal Magistrate Court (Hon. J. A Agonda SRM) on 16.08.2016 in Mavoko PMCC Misc. Application No. 20 of 2016;
2. A declaration that the trial court in delivering the ruling dated 16.8.2016 violated the Applicants' rights under Articles 47, 48 and 50 of the Constitution;
3. Any appropriate order or direction be issued by this Court in exercise of its supervisory jurisdiction to ensure the fair administration of justice;
4. An order for costs.

The said application is supported by the grounds set out in the Statement and supporting and verifying affidavits of Jones Makau Mutisya filed contemporaneously with the application for leave dated 18.8.2016. The Applicants state therein that they are directors of Jomax Consultants Limited together with the 2nd Respondent herein, and have been having wrangles over the financial management of the said company. Further, that there has been no smooth running of the company resulting in accusations and counter-accusations, and also leading to court cases between the directors and the company.

The Applicants further state that they made a report to the CID Mlolongo concerning conversion of company properties and funds by the 2nd Respondent herein, which matter was assigned to one P.C Raphael Omahe Rhioba to investigate, who obtained search warrants in Mavoko Misc. Criminal Application No. 40 of 2016 on 18.5.2016. That they were then served with an application by way of Notice of Motion dated 5th August 2016 in **Mavoko PMCC Misc Application No. 20 of 2016 - Fredrick Nthumo Maingi vs The Officer in Charge CID Mlolongo and 2 others** which application sought *inter alia* orders:

1. That the court pending the hearing and determination of the application be pleased to compel immediately the 1st Respondent (the CID Mlolongo) to release the aforementioned properties to the applicant.
2. The court pending the hearing and determination of this matter be pleased to grant orders restraining the Respondents from interfering, confiscating and for tampering with the items belonging to the company.
3. That the court be pleased to make such other or further orders as are deemed to be just and expeditious for the singular objective of satisfying the ends of justice herein.

The Applicants averred that the said application was served on them on Thursday 11th August 2016, and was scheduled for hearing on Monday 15th August 2016, and that they were only able to instruct counsel to enter appearance on their behalf on Monday 15th August 2016.

The Applicants' case is that when the matter came up for hearing before Hon. J.A. Agonda (SRM) on 15th August 2016, the parties were represented by Mr. Oyieko advocate for the Applicants, and Mr. Mulei advocate for the 2nd and 3rd Respondents therein, and that Mr. Mulei intimated to the said court that he would raise a preliminary objection on points of law, which objection was to be heard before the application could be canvassed. However, that the trial court did not allow the said counsel to address it on either the point of law or at all. Further, that Mr. Mulei was interrupted by both the court and the counsel for the 2nd Respondent herein, and that the Court thereafter adjourned the matter for directions to be given the following day 16th August 2016 at 2.00pm.

According to the Applicants, the parties appeared before the trial court on 16th August 2016 as directed to receive the court's directions on the matter, only for the court to deliver a ruling allowing the application dated 5th August 2016, and thus ordering the CID Mlolongo to return goods seized through a warrant of arrest issued by the court on 18.5.2016.

The Applicants claim that the court in so doing delivered a ruling in respect of an application that was neither prosecuted nor canvassed, and further went against its own orders that the matter was coming up for directions and not ruling. Further, that the court violated the Applicants' rights herein to be heard and to fair administrative action, access to justice and of a fair trial as enshrined in Articles 47, 48 and 50 of the Constitution.

The Applicants attached copies of the application dated 5th August 2016 filed in **Mavoko PMCC Misc Application No. 20 of 2016 - Fredrick Nthumo Maingi vs The Officer in Charge CID Mlolongo and 2 others**, the handwritten proceedings of 15.08.2016, when the said application came up before Hon. J.A Agonda (SRM) for hearing, and the ruling delivered by the said magistrate on 16th August 2016.

The Respondents did not file any response to the said application despite directions and opportunity to do so, and the Applicants thereupon sought a judgment on the basis of the pleadings they had filed.

The Issues and Determination

I have considered the pleadings by the Applicants. The issue that requires determination is whether any grounds have been established by the Applicants for the orders sought of certiorari and declarations sought to issue against the Respondents. The scope of the judicial review remedy of *certiorari* was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** in which the said Court held *inter alia* as follows:

“Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

Likewise, in **Captain Geoffrey Kujoga Murungi vs Attorney General, Misc. App No. 293 of 1993** is as follows:

“Certiorari deals with decisions already made – so that when issued an order brings up into this Court a decision of an inferior court, tribunal or of a public authority to be quashed. Such an order (certiorari) can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice; or contrary to law.”

In this respect the Applicants argue that they were not given the right to be heard, and that their rights to a fair administrative action access to justice and fair trial were violated.

I have in this regard perused the proceedings in **Mavoko PMCC Misc Application No. 20 of 2016 - Fredrick Nthumo Maingi vs The Officer in Charge CID Mlolongo and 2 others** on 15th August 2016 that were attached to the Applicants' statement and supporting affidavit, and note that the application before the said Court for hearing was the application by the 2nd Respondent's herein dated 5th August 2016, and the Applicants' Advocate indicated at the hearing that he had not yet filed a replying affidavit to the application and wished to raise a Preliminary Objection.

The 2nd Respondent's Advocate thereafter addressed the court on service of the application on the Applicants having been made on 5th August 2016, and the grounds of their application. The magistrate thereupon ruled that she would give directions on 16th August 2016 which was the next day. On 16th August 2016 the magistrate proceeded to deliver a ruling on the *ex parte* application and Notice of Motion dated 5th August 2016.

I am guided in this respect by the principle of fairness, which is a key tenet in administrative and judicial action, and is one of the grounds on which a court will intervene to quash decisions made in violation of individual rights and liberties. A fundamental tenet of fairness is that powers should be exercised in

accordance with the rules of natural justice which entail two procedural requirements namely the right to be heard and the rule against bias.

The rules of natural justice impose a duty on the body, tribunal or court vested with powers to resolve a dispute to hear both parties, and consider both sides of the case before making a decision on the matter. Therefore no man should be condemned unheard. One of the key facets of the right to be heard is that a person is given adequate notice of the case against them and the opportunity to prepare his case and present evidence in support of his case. See in this regard the decision in **R. vs Kenya Medical Training College ex parte James Chepkonga Kandagor (2006) e KLR**.

In the present application the Applicants claim to have been served with the application dated 5th August 2016 filed in in **Mavoko PMCC Misc Application No. 20 of 2016 - Fredrick Nthumo Maingi vs The Officer in Charge CID Mlolongo and 2 others** on 11th August 2016. The Respondents did not contest this averment and neither did they bring any evidence of when service of the said application was effected on the Applicants. In addition, when the hearing came up on 15th August 2016, four days later, the proceedings show that the Applicants were not given any opportunity to prepare their case or address the Court before it delivered its ruling on the application, one day later on 16th August 2016.

It is also evident that the actions by the 1st Respondent were not only against the rules of natural justice, but also violated the rights to fair administrative action and a fair hearing enshrined under Articles 47 and 50 of the Constitution respectively, by condemning the Applicants unheard.

The right to fair administrative action is now provided for in Article 47 of the Constitution as follows;

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.”

The Court of Appeal in **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR** defined fair administrative action as follows:

“Fair administrative action on the other hand refers broadly to administrative justice in public administration. It is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. The right to fair administrative action, though a fundamental right, is contextual and flexible in its application and as article 24(1) provides, can be limited by law.”

As to the elements of fair administrative action, section 4(3) of the **Fair Administrative Action Act, 2015** now provides as follows:

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative

action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

The nature of the decision made by the 1st Respondent in the ruling delivered in **Mavoko PMCC Misc Application No. 20 of 2016 - Fredrick Nthumo Maingi vs The Officer in Charge CID Mlolongo and 2 others** by Hon. J.A. Agonda (SRM) on 16th August 2016 was one that affected the rights of parties involved, as they were in a dispute over their rights to property of a company in which they are directors, and therefore would definitely attract the requirements of procedural fairness detailed out in the foregoing.

As regards the right to hearing, Article 50 (1) of the Constitution provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The Court of Appeal in **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR** held that the right to a fair hearing as employed in Article 50(1) of the Constitution is a term of art, which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. In addition, that by Article 25 that right cannot be limited by law or otherwise.

The application of this right and its scope can therefore only be in the context of a judicial or quasi-judicial hearing such as the hearing by the 1st Respondent held on 15th August 2016, and this Court has already found that there was an infringement of this right by the 1st Respondent in not affording the Applicants an opportunity to be heard.

The Applicants also relied on Article 48 of the Constitution which provides for the right to access to justice and requires the State and state organs to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. This particular Article deals with financial facilitation and assistance from the state to aid access to courts and is inapplicable in the circumstances of the present application.

In the premises, the Applicants' Notice of Motion dated 23rd September 2016 is found to have merit, and is and it is accordingly ordered as follows:

1. It is hereby declared that the action by the 1st Respondent of making a ruling and orders on 16th August 2016 in **Mavoko PMCC Misc Application No. 20 of 2016 - Fredrick Nthumo Maingi vs The Officer in Charge CID Mlolongo and 2 others** without affording the Applicants an opportunity to be heard violated the rights of the Applicants under Articles 47 and 50 of the Constitution of Kenya.

2. That an order of certiorari is hereby issued to remove and bring into the High Court the proceedings by Hon. J.A. Agonda (SRM) on 15th August 2016 in **Mavoko PMCC Misc Application No. 20 of 2016 - Fredrick Nthumo Maingi vs The Officer in Charge CID Mlolongo and 2 others**, and ruling and orders made therein by Hon. J.A. Agonda (SRM) on 16th

August 2016, which proceedings, ruling and orders are hereby quashed.

3. There shall be no order as to the costs of the Applicants' Notice of Motion dated 23rd September 2016.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF APRIL 2017

P. NYAMWEYA

JUDGE