



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

JR. MISC. CIVIL APPLICATION NO. 15 OF 2017

**IN THE MATTER OF ARTICLE 20, 21, 22(1), 27, 28, 29, 47 AND 239(3) OF THE
CONSTITUTION**

AND

**IN THE MATTER OF THE CHUKA CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO.
289 OF 2017**

AND IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF THE LAW REFORM ACT 26 LAWS OF KENYA

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE BY KENNETH NTWIGA KANGA TO
INSTITUTE JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF PROHIBITION AND
CERTIORARI**

BETWEEN

KENNETH NTWIGA KANGAAPPLICANT

VERSUS

THE DCIO.....1ST RESPONDENT

THE DIRECTOR PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE CHIEF MAGISTRATE COURT.....3RD RESPONDENT

THE HON.ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. By Chamber Summons dated 13th October, 2017 brought under **Order 53 Rule 1** of the **Civil Procedure Rule**, Kenneth Ntwiga Kanga, the ex parte applicant herein sought the following orders:-

(i) That the application be certified urgent

(ii) That this honourable court be pleased to grant leave to ex parte applicant to commence Judicial Review proceedings seeking for Judicial Review order of certiorari to remove into this honourable court for purposes of being quashed the decision of the 1st and 2nd Respondents to prefer criminal charges against the ex parte applicant herein based on the facts contained in the charge sheet dated 15th September, 2017 in Chuka Principal Magistrate's Court Criminal Case No.789/17 (Republic –vs- Kenneth Ntwiga Kanga and Another).

(iii) That this honourable court be pleased to grant leave to the ex parte applicant to commence Judicial Review proceedings seeking for the Judicial Review Order of Prohibition directed at the Respondents, by themselves their agents, servants and/or employees or their officers or whomsoever else acting on the respondent's instructions or behest from proceeding with the criminal prosecution or charges against the ex parte applicant herein based on the charge sheet or facts contained in the charge sheet dated 15th September 2017 in Chuka Principal Magistrate's Court Criminal Case No.789 of 2017 (Republic –vs- Kenneth Ntwiga Kanga and Another.)

(iv) That the said leave if granted do operate as a stay of any further proceedings of whatever nature in Chuka Principal Magistrate's Court Criminal Case No.789 of 2017 pending the filing, hearing and determination of the substantive Notice of Motion.

(v) That the costs be provided.

2. The application is grounded on the following grounds listed on the face of the application namely:-

a) That the decision to charge the ex parte applicant with a criminal offence was made in bad faith.

b) That the prosecution against the ex parte applicant has been unfairly instigated with the sole aim, intention and purpose of removing the ex parte applicant from office through the back door using unorthodox means.

c) That prosecution against the ex parte applicant is intended to achieve other purposes other than a criminal trial or justice and the same is a violation of ex parte applicant's constitutional rights and freedoms.

d) That the prosecution against the ex parte applicant is an abuse of the criminal justice system and due process of the law and the court.

3. The applicant has filed statements of facts and a Supporting Affidavit which he intends to rely on in challenging the decision by the 1st and 2nd Respondents to charge him in court vide the cited ***Criminal Case No. 789 of 2017 at Chuka Principal Magistrate's Court***. He maintains that the sole purpose of the criminal case is to remove him from office through the back door and flouting the law and procedure.

4. The applicant has in his affidavit in support of this application sworn on 18th October, 2017 deposed that when he reported on duty on 11th September 2017, he found four police officers in the company of an official from the Interested Party herein and that after inquiring about the County Public Service Board Seal, they requested him to lead them to his house where a search was conducted. According to the applicant, the search did not yield anything useful to the officers but added the officers requested him to accompany them to Chuka Police Station where he was asked to record a statement.

5. The ex parte applicant has further deposed that the same day he received a letter from County Secretary and Head of County Public Service asking him to proceed on compulsory leave. The applicant faults the suspension letter stating that the suspension was on ground of being arrested and other allegations he terms as unsubstantiated. He has annexed the copy of the letter as exhibit **KNK 4**. The applicant has argued through his learned counsel that the letter reveals that the charges are fabricated and intended to

circumvent the provision of **Section 58(5)** of the **County Government Act** which stipulates how a member of a County Public Service Board can be removed from office.

6. The applicant's counsel has further pointed out at the speed at which the Interested Party reported the incident to the police and proceeding to send the applicant out on compulsory leave. The ex parte applicant hold that the report was made to the police on 11th September 2017 and he was reportedly arrested the same day and got the letter sending him on compulsory leave the same day. In his view the speed of the cited events is suspect because in his view he was not found with the Seal and there was no basis for compulsory leave.

7. The ex parte applicant's counsel further pointed out that as per the charge sheet exhibited as **KNK 6**, the OB indicates that a report was actually made to the public on 14th September, 2017 the same day that applicant was arrested and arraigned in court the following day to face charges on 15th September 2017. Mr Kariuki learned counsel for the applicant submitted that the chronology of events as per the documents he has exhibited shows that the applicant was suspended before a formal complaint was made to the police. It is contended that the charges were meant to validate the removal of the ex- parte applicant and that in his view forms a basis for him to mount a challenge through Judicial Review and has asked this court to intervene by granting him leave to challenge the decision to charge him.

8. The ex parte applicant has relied on a number of authorities cited by the Interested Party in his contention that though the 2nd Respondent has decisional independence to charge, the discretion is not absolute because it must be exercised properly and not abused. The ex parte applicant has cited the Court of Appeal decision in the case of **JORUM MWENDA GUANTAI- VS- CHIEF MAGISTRATE NAIROBI (NAIROBI CIVIL APPEAL NO. 228 OF 2003)** where the Court of Appeal held that where a person considers himself a victim of oppression and the courts finds that his prosecution amounts to an abuse of the process of the court and vexatious, the court has power to intervene through an order of prohibition.

9. The cited decision of **JOHN MURITU KIGWE** and **SUSAN WANJIRU MURITU –VS –A.G. (NAIROBI HCC NO. 223 of 2000)** has also been cited by the ex parte applicant in his contention that courts should intervene in situations such as obtaining in this case in view of the established dictum of law that courts should always intervene where the purpose of prosecution is predominantly designed to achieve other purposes, other than what than law was designed to achieve. The ex parte applicant has argued that this court has inherent power to check the abuse of power through Judicial Review adding that the 1st and 2nd respondents failed to exercise their discretion properly. He further relied on the decision cited by the Interested Party in the case of **WILFRED JOSIAH MANDA** and **ANOTHER –VS- PATRICK MUKUA MUTHANI AND 2 OTHERS [2016] eKLR** where the court held inter alia that the purpose of Judicial Review is to address defects in decision making processes by public bodies and not the merits of such decisions.

10. The 1st and 2nd Respondent opposed this application and based their opposition to the replying of one **PC Reuben Kibet** a police officer attached to DCI Tharaka Nithi County and the investigating officer in the criminal case against the ex parte applicant. The Replying Affidavit was sworn on 7th November 2017.

11. The 2nd Respondent has deposed that it received reports about cases of fraud being perpetrated at the County of Tharaka Nithi and launched investigations which according to him revealed several employees were irregularly employed. The 2nd Respondent has also deposed that the County Public Service Board Seal was misused and the ex parte applicant herein being the custodian of the said seal and all other documents is suspected to have committed an offence known in law and that is why they decided to charge him. They have denied being instigated by the interested party to prefer charges against the ex parte applicant and have contended that power to prosecute an individual lies on them and should not be subjected to any person or authority. It is submitted that this court would be crossing the line of the independence of the Director of Pubic Prosecution if it stops or checks the prosecution of the ex parte applicant. In their view, the ex parte applicant is simply raising his defence to the charges through this

Judicial Review application rather than concentrating on the criminal case.

12. The 2nd Respondent has justified its action against the ex parte applicant stating that it acted independently and there is nothing to show it acted capriciously, in bad faith or abused legal process to warrant an intervention by this court. In its view the ex parte applicant will be offered a fair trial and a fair administrative process and no evidence has been laid to show that he is likely to suffer prejudice at this trial in the Subordinate Court.

13. Mr. Machirah learned state counsel for the 1st and 2nd Respondent further submitted that the 1st initial report on the alleged crime was made to the 1st and 2nd Respondent on 10th July 2017 and in their view that is when investigations commenced. Mr. Machirah contends that the issue as to when the report was booked on the OB at the police station can be canvassed outside the Judicial Review proceedings.

14. The 2nd Respondent further holds that the ex parte applicant is not immune to prosecution and that it acted in public interest pursuant to the provisions of **Article 157 (11)** of the **Constitution**. It denied wanting to circumvent the provision of **Section 58 (5)** of the **County Government Act**. It is 2nd Respondent's contention that the application herein reveal no ground for Judicial Review as provided under **Section 7 (2) (a)** of **Fair Administrative Action Act 2015**. They have urged this court not to allow the application and if minded to allow the leave should not operate as a stay of proceedings given that they are other people charged together with the ex -parte applicant at the Subordinate Court.

15. The 3rd Respondent has also opposed this application through the Attorney General. Mr. Kiongo learned counsel appearing for the 3rd Respondent submitted that in his view the ex parte applicant has not established a prima facie case to be granted leave to apply for Judicial Review orders. He contended that the applicant has not faulted the 3rd Respondent in any way and has not expressed any fears that he is not going to be given a fair hearing. Mr Kiongo's view was that the applicant should have filed a Constitutional Petition if he felt that his constitutional rights were infringed. The 3rd Respondent has further contended that a stay if granted it would hinder prosecution of other parties in the criminal court and that statutory bodies should be allowed to discharge their duties as mandated by law.

16. The Interested Party has also weighed in the opposition of this application through grounds of objection dated 13th November, 2017 and a list of authorities filed.

17. The Interested Party through learned counsel Mr. Karanja submitted that the powers of the 2nd Respondent to prosecute are guarded and relied on the decision of **ROSEMARY WANJA MAGIRU and 2 OTHERS –VS- A.G. and 3 OTHERS [2013] eKLR** where the court inter alia observed that the constitutional mandate given to the office of Director of Public Prosecution include investigation of crimes and prosecution and that courts will in ordinary circumstances be reluctant to restrain them in the exercise of that mandate.

18. The Interested Party has further submitted that the charges facing the ex parte applicant relate to abuse of office which in their view is an offence known in law. The Interested Party contends that the applicant admitted in his statements that he is the custodian of County Public Seal which was used in the commission of the alleged crimes and that the applicant is answerable to the crime committed using documents and the seal which were in his custody.

19. The County Government of Tharaka Nithi has further submitted that the applicant is liable for misuse of the official stamp and seal contending that the applicant had not raised any issue on security of the County Public Seal. It is the interested party's position that the applicant has not made out a prima facie case to warrant leave be given and that the statements filed by the 2nd Respondent herein reveal that crimes or offences were committed and the 3rd Respondent should be left to determine who committed them. The Interested Party has relied on the authority of **Aga Khan Education Service Kenya –vs- Republic ex parte Ali Seif and 3 Others [2004] eKLR** where the Court of Appeal held inter alia that it is incumbent upon an applicant to prove that he has an arguable case for a grant of leave under **Order 53** of

Civil Procedure Rules and that statement of facts should reveal the basis for such leave. It is the Interested Party's case that the applicant has not disclosed material facts to warrant this court to exercise its discretion in his favour.

20. It is further submitted that the applicant has not made out a case for orders of Certiorari, Mandamus and Prohibition and a decision in *Kenya National Examination Counsel - vs- Republic* has been cited though the citations have not been provided. The Interested Party nonetheless has submitted that certiorari and prohibition can only issue where excess jurisdiction has been cited and that the applicant has cited none.

21. The Interested Party has further submitted that it is undergoing losses due to the actions of the applicant and that criminal trials should be conducted swiftly as a deterrent measure and a lesson to other employees of the County.

22. I have considered the application and all arguments or submissions made by the ex parte applicant, the Respondents and Interested Party. I have considered all the authorities filed by the Interested Party and relied on partly by the applicant in his application. This is a fairly simple application for Judicial Review where the applicant intends to challenge the decision by the 1st and 2nd Respondent to prefer and prosecute criminal charges against him before the 3rd Respondent herein. The applicant was aggrieved by the decision to charge him in a criminal court and has faulted the 1st and 2nd Respondent for having interior motive of removing him from office. The law requires that before a person can challenge such decisions he should first seek leave and it is on the basis of that the applicant has moved this court under the provisions of **Order 53 Rule 1** of the **Civil Procedure Rules**.

23. This court on the basis of the application filed and the facts relied on found it fit to invite the Respondents and the Interested Party to make their respective representations on account of allegations levelled against them. This court noted and observed from the Responses made that all the parties in this application went much deeper than anticipated by delving much on the merits or the substance of the application which I find rather premature at this stage. The court at this state of Judicial Review is only interested on whether there is basis for the ex parte applicant going by the statement of facts filed (pursuant to provisions of **Order 53 (2) Civil Procedure Rule**) to be granted leave to move to the next stage of bringing a substantive motion to challenge the actions taken by the Respondents. I will therefore restrict myself only to this aspect in this ruling and whether or not a stay should be granted if I am persuaded to grant leave.

24. It is trite law that the power and mandate to prosecute rests on the office of Director of Public Prosecution and the constitution grants that office decisional independence to prosecute or not to prosecute. That power however is not absolute because where it is established that the power has been abused in order to oppress a persons (s) or achieve a collateral purpose courts can intervene by way of Judicial Review. This is now well settled as observed in the decision of *WILFRED JOSIAH MANDA and ANOTHER -VS- PATRICK MUKUA MUTHANI and 2 OTHERS [2016] eKLR*.

25. The applicant herein alleges that the decision to charge him in a criminal court is aimed at kicking him out of office without compliance with either provisions of **Section 58 (5)** of the **County Government Act**. The provisions of **Section 58 (5)** of the statute provides as follows:-

“Members of the Board (County Public Service Board) may only be removed from office:

a) On grounds set out for removal of members of a Constitutional Commission under Article 251(1) of the Constitution and

b) by a vote of not less than seventy five percent of all members of the County Assembly.”

It is the above strict requirements required to have someone occupying the position of the applicant herein that the applicant feels made the Interested Party and to instigate the 1st and 2nd Respondent to prefer

criminal charges against him. Although the Respondents and Interested Parties vehemently denies the allegations, the court at this stage does not concern itself with the merits of such claims or the challenge of Director of Public Prosecution's decision to charge. The court's concern at this stage is whether there is a basis for the applicant to be granted leave to challenge the decision to charge him.

26. The big question in this application is therefore whether the applicant herein has made out a prima facie case fit to be entertained substantively at the substantive stage under the provisions of **Order 53 (3)** of the **Civil Procedure Rule**. In answering this question, care should be exercised so as not to prejudice any of the parties by making any pronouncements on the issues raised. I have looked at the statements of facts and the verifying affidavit by the applicant and I am satisfied that the allegations made therein merits a chance for further interrogation and canvassing at the substantive stage. I am not persuaded by the 3rd Respondents contention that the applicant should have filed a constitutional review if he felt that his constitutional rights have been infringed. This is because the scope of Judicial Review has now been expanded to cover areas that were hitherto a preserve of constitutional court. Now a constitutional court sitting exercising its jurisdiction can grant a Judicial Review remedy going by the provisions of **Article 23(3) (f)** of the **Constitution 2010**. A party who alleges infringement of any right under the bill of rights can lawfully and procedurally move a court through Judicial Review. The applicant herein therefore is within his right to move this court alleging infringement of his rights including a right to a fair trial

27. This court is satisfied that the application for leave to apply for the remedy of certiorari and prohibition against the decision to charge and prosecute him is merited. However I am not satisfied that leave should operate as a stay of further proceedings for the simple reason that apart from the fact that the applicant failed to persuade me on the prejudice he would otherwise suffer, there are other parties who are charged alongside him. I am minded to agree with the Respondents and the Interested Party that a right to a fair trial includes a right to a speedy trial and so staying the proceedings in the lower court vide **Criminal Case No. 789 of 2017** would infringe on the rights of the other accused persons which rights are well spelled under **Article 50 (e)** of the **Constitution**. It is not practical nor desirable to separate the trial as urged by the applicant because the consequences of such would be the same. It will cause unnecessary delays.

In the premises I allow this application in terms of prayer one and three only. The applicant has 21 days from the date of this ruling to file the main motion. For the reasons given I decline to grant a stay of proceedings in **Chuka Principal Magistrates's Court Criminal Case No789 of 2017**. That case shall therefore proceed as scheduled and I make no further order or directions on how the case proceeds.

Dated and delivered at Chuka this 30th day of November, 2017.

R. K. LIMO

JUDGE

30/11/2017

Ruling signed, dated and delivered in open court in the presence of applicant in person, Kiongo for 3rd Respondent, Machirah for 1st and 2nd Respondent and Kinyua for I.P

R.K. LIMO

JUDGE

30/11/2017