



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**JUDICIAL REVIEW NO. 4 OF 2015**

(Formerly J.R. Nairobi HCC Misc. No. 189 of 2015)

**GEOFFREY MUHORO.....APPLICANT**

**-VERSUS-**

**THE INSPECTOR GENERAL OF POLICE.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

1. On 18<sup>th</sup> June, 2015 the exparte Applicant **Geoffrey Muhoro** approached the High Court at Nairobi under Order 53 (1) and (4) of the Civil Procedure Rules seeking leave to apply for an order of prohibition against the Inspector General of Police (1<sup>st</sup> Respondent) and the Director of Public Prosecutions (2<sup>nd</sup> Respondent); and secondly an order of mandamus against the 1<sup>st</sup> Respondent.

2. Odunga J granted the prayer for leave and also directed that the matter be removed to the High Court Registry at Naivasha. At the same time he ordered that leave granted would operate to stay any intended arrest, further arrest, detention or preference of any charges against the Applicant pending the determination of the substantive motion pursuant to leave granted.

3. Such motion was filed on 29<sup>th</sup> June 2015. The notice of motion seeks the following orders:-

**“1. THAT this Honourable Court be pleased to issue an order of prohibition to prohibit the Respondents from arresting, re-arresting, harassing, holding the Applicant in custody preferring charges against the Applicant from allegations that the Applicant threatened any person trespassing on his parcel of land.**

**2. THAT this Honourable Court be pleased to issue an order of mandamus to compel the Respondents to return the Applicant’s firearm.**

**3. THAT costs be provided for.”**

4. It is expressed to be supported by the material, including the Affidavit of the Applicant attached to the initial motion. The gist of the said material, especially the annexures to the affidavit provides a background to the dispute. The exparte Applicant has a long-running dispute with third parties, including Lake Flowers Limited over the ownership and use of a land parcel in Naivasha identified as **LR NO.**

22957/4 (the suit land).

5. On 25<sup>th</sup> March, 2011 Ouko J entered Judgment for the exparte Applicant in **Nakuru HCCC 97 of 2009 Geoffrey Muhoro –Vs- Lake Flowers Limited** and restrained Lake Flowers Limited from trespassing upon the said land. He further directed the said party to remove all temporary structures erected on the property. Apparently, an appeal filed in the Court of Appeal by Lake Flowers Limited is yet to be determined. However an application for stay pending appeal, lodged by the latter party **Civil Application No. 114 of 2011 Lake Flowers Limited -Vs Geoffrey Muhoro**, was rejected by the Court of Appeal in its ruling delivered on 8<sup>th</sup> April 2015.

6. The exparte Applicant claims that early in June 2015 he learned about the presence of a herd of goats and cows which had been driven to the suit land and that the people responsible had pitched a tent thereon. He reported to Naivasha Police Station vide Occurrence Book Report No. **51/8/06/2015**.

7. With the help of Administration Police to whom the report was referred, the exparte Applicant successfully removed the “armed maasai man” and his herds from the property. The tent was also removed. However on 10<sup>th</sup> June 2-15 he was summoned by the DCIO Naivasha who proceeded to withdraw his firearm and firearm certificate.

8. He now claims that a “very senior government official” is behind his woes and that the object of the “harassment” is to divest him of the suit land and to defeat existing court orders in his favour. The Applicant was represented by Njoroge.

9. The Respondents are represented by Mr. Kibelion. They filed grounds of opposition on 14<sup>th</sup> July 2015. The said grounds are as follows:

**“1. THAT the application is misconceived, frivolous, vexatious, incompetent and bad in law and generally an abuse of the court process.**

**2. THAT the application does not meet the threshold for grant of orders sought.**

**3. THAT the orders sought are in clear breach of Article 57 of the Constitution and Section 4 of the National Police Service Act.**

**4. THAT the application is based on unsubstantiated claims without any basis in law.**

**5. THAT in the upshot the application is devoid on merit and ought to be dismissed.”**

10. At the hearing Mr. Njoroge took issue with the nature of the response filed by the Respondents and urged the court to disregard the grounds of objection and to proceed to grant the motion.

11. For his part Mr. Kibelion cited Order 51 Rule 14 of the Civil Procedure Rules and Order 53 Rule 6 of the Civil Procedure Rules in defence of the grounds, asserting that the Respondents were at liberty to respond through grounds or by replying affidavit. He called to aid the provisions of Article 159 2 (d) of the Constitution in urging the court not to attach undue regard to procedural technicalities.

12. Regarding the application itself his response was two pronged. Firstly that the exercise of authority bestowed upon the Respondents under the Constitution and the law cannot be interfered with, unless it is demonstrated that the same has been abused. Hence, in this case, the court cannot prevent the 1<sup>st</sup> Respondent from carrying out investigations, or the 2<sup>nd</sup> Respondent from prosecuting the exparte Applicant by virtue of his powers under Article 157 of the Constitution.

13. Secondly Mr. Kibelion argued that from the material submitted in support of application, the same is premised on rumours concerning the intentions of an unnamed “government official”. As regards the firearm, it was contended that the 1<sup>st</sup> Respondent was entitled under the Firearm Act to withdraw the

same in the event of a violation of prescribed conditions.

14. In reply Mr. Njoroge stated that the facts stated by the exparte Applicant have not been controverted. He was of the view that the failure by the Respondents to file a Replying affidavit makes it impossible for the court to determine the application on merit. He pointed out that no evidence had been tendered to demonstrate misuse of firearm, or misconduct on the part of the Applicant.

15. Having considered the material canvassed before me, I have identified two issues that require determination. Firstly, whether the Respondents' grounds of opposition are admissible in a case of this nature, and secondly whether the Applicant is entitled to the reliefs he is seeking.

16. On the first question, there is no dispute that the motion before the court is brought under Order 53 of the Civil Procedure Rules. The order provides for the procedure to apply in relation to judicial review proceedings as anticipated in Section 9 of the Law Reform Act.

17. Rule 1 (2) of Order 53 sets out the format of the application for leave and requisite accompanying material. Upon leave being granted, such material together with the substantive motion are to be served upon Respondent as required by Rule 4 (1). Rule 4 (1), (2), (3) appear to contemplate that any party to the application may file affidavits. There is no express provision requiring that a party served with the substantive motion must respond by way of affidavit alone.

18. In my view, the fact that Rule 4(1) allows for the filing of grounds by the Applicant opens the door to the Respondent also to file grounds in opposition. Indeed under Rule 6, the court has discretion to allow a party to be heard, who has not previously been served with notice, and therefore one who may possibly not have filed an affidavit.

19. Evidently the procedure for judicial review was intended to be separate from the ordinary civil procedure as Order 53 appears to be a stand-alone order amongst the Rules with a self contained procedure. Thus Order 51 Rule 14 of the Civil Procedure Rules may not have a direct application on an application for judicial review. However the underlying principles and purpose underlying Order 51 are not any different from those in Order 53, namely the provision of an opportunity to the Respondent to be heard in an application before the court.

20. I cannot find any plausible reason why a Respondent cannot, in opposition to a motion, file grounds of opposition, a preliminary objection or a replying affidavit, or all of them. The opposing party makes his election. The grounds filed by the Respondents on the face of it raise a challenge based on law. For the foregoing reasons, I am not persuaded by Mr. Njoroge's objections with regard to the grounds of opposition filed by the Respondents.

21. Turning to the substance of the application, I must observe at the outset, that apart from the multiple annexures to the Applicant's affidavit, the affidavit itself is very brief. As for the grounds upon which relief is sought, these are:

- “i) The Applicant's gun has been illegally withdrawn by DCIO Naivasha.**
- ii) The Applicant cries for justice because DCIO wants to detain the Applicant and later charge him in Court illegally.**
- iii) The Applicant feels that a senior office of Government is using the DCIO to harass the Applicant and eventually snatch his property.**
- iv) The act or withdrawing the Applicant's gun and detaining him in custody is an act against legitimate expectations of a Government officer/Civil servant.**
- v) The Respondents act are illegal, unlawful ad in excess of jurisdiction and amounts to abuse of office.”**

22. The fact of the withdrawal of the Applicant's firearm by the DCIO Naivasha is not disputed. Neither the fact that an investigation was being conducted with regard to allegations that the Applicant had threatened some persons with the firearm (See paragraph 3, 4, 5, 6, 7, 12 of the Applicant's affidavit.)

23. During submissions, the Applicant made little effort to demonstrate the illegality alleged in grounds (i) and (ii) of his application. Ground (iii) recites rumoured information that a senior, unnamed "government official" was orchestrating the events with the intention of taking the Applicant's land. Grounds (iv) and (v) cite the Appellant's legitimate expectation and the Respondents' actions in alleged excess of jurisdiction.

24. Similarly, these complaints were not demonstrated to the court either by affidavit evidence or by submissions. It seemed to me that the Applicant was relying on the mere fact of the ongoing investigations and the withdrawal of his firearm as evidence to support his stated grounds. It is not enough in my view for an Applicant to toss some stated grounds and sketchy facts before the court and expect it to exercise its discretion in proceedings of this nature.

25. In the case of **Municipal Council of Mombasa –Vs- Republic and United Consultants Ltd Civil Appeal No. 185 of 2001** it was held that:-

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself; the court would concern itself with such issues as to whether the persons affected by the decision were heard before it was made, and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters..... The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision. [See also Republic –Vs- Kenya Revenue Authority Ex parte Yaya Towers Ltd [2008] eKLR. Judicial review is concerned with fairness; to ensure that statutory discretion is properly exercised.”**

26. Thus where discretion is abused or exercised unreasonably or irrationally or for an improper purpose or in breach of duty to act fairly the court will intervene [**See Republic –Vs- Minister for the Home Affairs & Others Ex parte Sitamze Nairobi HCCC No 1652 of 2004 [2008] 2 EA 323**]. As observed earlier, the illegality alleged against the Respondents by the Applicant has not been demonstrated.

27. The Applicant has alluded that the true motive of the Respondents is to aid an unnamed third party to "snatch" his property. No evidence of the alleged collusion has been tendered. The Applicant has been heard, in that he admits to have recorded a statement and appears fairly familiar with the incident under investigation. The police have a statutory duty and necessary powers to investigate complaints related to criminal activity. Unless the ongoing investigation is demonstrated to be driven by improper purposes or the decision to withdraw the firearm to be illegal, irrational or unreasonable, it is difficult for the court to justify intervention.

28. Moreover, the Applicant's main concerns regarding the anticipated arrest and arraignment have not been brought within the threshold of 'real danger' of prejudice arising from violation or threat of violation of particular rights. In the case of **Martin Nyaga Wambora –Vs- Speaker of the County Assembly of Embu & 3 Others Petition No. 7 of 2014** the court stated with regard to likely prejudice that:

**[59] “.....[an applicant] must demonstrate that .....there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.....**

**[60].....The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court.....an allegedly threatened violation that is remote and unlikely will not attract the court's attention.”**

I daresay that the fear that the Applicant might lose his property due to the alleged threatened violation

appears to be farfetched, in this case.

29. With regard to the 2<sup>nd</sup> Respondent, it is evident that no charges have been preferred against the Applicant. The Applicant appears to be acting in anticipation. However, the 2<sup>nd</sup> Respondent has wide prosecutorial powers under Article 157 of the Constitution. He does not act under the directions of any person. The court would only intervene where the said powers are abused, and this has not been established herein.

30. The Court of Appeal stated in the case of **Manilal Jamnadas Ramji Gohil –Vs- Director of Public Prosecutions Nairobi Criminal Appeal (Application No. 57 of 2013)**:

**“We are mindful that an order staying criminal proceedings would be granted only in the most exceptional circumstances. See Goddy Mwakio & Another –Vs- Republic [2011] eKLR where this court, in illustration of this point stated that:**

**“An order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstance.”**

31. As I observed in **Republic –Vs- George Okello & Another [2012] eKLR** it is equally important to consider “where the line should be drawn between the conflicting rights of the accused and societal interest” (**Per Mclachlin J in Republic –Vs- Morin [1992] 1SCR 771**). Although the said case related to prejudice resulting from delayed prosecution, the learned judge emphasised that:-

**“.....where the accused suffers little or no prejudice, it is clear that the consistently important interest of buying those charged with Criminal Offences to trial outweighs the accused’s.”**

32. In a similar **South African** case, **Sanderson –Vs- The Attorney General, Eastern Cape 1988 (2) S. A. 38 CC, Kriegler J** (as he then was) emphasised the need to bear in mind public interest where prejudice is alleged by an Applicant seeking prohibition of prosecution. He stated:-

**“Even if the evidence he has placed before the court had been moved damning, the relief the Appellant seeks is radical, both philosophically and sociopolitically. Barring the prosecution before the trial begins – and consequently without any opportunity to ascertain the real effect of delay on the outcome of the case – is far reaching. Indeed it prevents the prosecution from presenting society’s complaint against an alleged transgressor of society’s rule of conduct. That will be seldom warranted in the absence of significant prejudice to the accused.”**

33. With regard to the orders sought by the Applicant, I do not consider them appropriate or efficacious in the circumstances of this case. It would seem that the decision to withdraw the firearm has already been made by the District Criminal Investigating Officer.

34. In the case of **Republic –Vs- Kenya National Examination Council Ex parte Gathenji & Others Civil Appeal number 266 of 1996** the Court of Appeal stated *inter alia* regarding the remedy of mandamus:

**“an order of mandamus compels the performance of duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongly performed i.e. that the duty has not been performed according to the law, the mandamus is the wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done.....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.”**

35. Hence the order of mandamus sought in this case cannot quash the decision by the District Criminal

Investigating Officer and by extension the 1<sup>st</sup> Respondent, to withdraw the Applicant's firearm. In regard to the remedy of prohibition the Court of Appeal continued to state that:

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice, the High Court would be obliged to prohibit it from acting contrary to the rules of national justice.**

**.....Prohibition is an order of the High Court directed to an interior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction of the laws of the land. It lies not only for excess jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however lie to correct .....a wrong decision on the merits.....”**

36. I understand the Applicant's complaint against the Respondents to be that the investigation and possible eventual laying of charges against him is intended not for lawful purposes but for the collateral purpose of harassing him and eventually divesting him of his property and that the Respondents are acting at the behest of an unnamed third party. As Mr. Kibelion has submitted the alleged unlawful purpose is premised on conjecture or “rumours” as the Applicant himself describes the said information.

37. In light of the foregoing, it is my considered view the Applicant has failed to make out a case to entitle him to the remedies sought. I do therefore dismiss the Application with costs.

Delivered and signed at Naivasha this **11<sup>th</sup>** day of **March, 2016.**

In the presence of:

For the Applicant : N/A

For the Respondents : Mr. Kibelion

Court Assistant : Stephen

**C. W. MEOLI**

**JUDGE**