



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 44 OF 2015

REPUBLIC.....APPLICANT

VERSUS

DR ALFRED N MUTUA

GOVERNOR OF THE COUNTY OF MACHAKOS...1ST RESPONDENT

COUNTY GOVERNMENT OF MACHAKOS2ND RESPONDENT

ATTORNEY GENERAL3RD RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY

EX-PARTE

SENATOR JOHNSTONE MUTHAMA

RULING

1. In the Star newspaper of 22nd January, 2015, the 1st Respondent Dr. Alfred Mutua who is the Governor of Machakos County caused an advertiser's announcement calling upon the people of Machakos County to report to him any corrupt dealings touching on the operations of Machakos County.
2. Some of the statements that appeared in that appeal were:

“I, Dr. Alfred N Mutua, Governor of Machakos requests you to furnish me with information on any person connected with Machakos County Government who has:

1. Asked or solicited a bribe from you in order to influence award of a tender or payment for goods or services provided.
2. Asked you to inflate a tender sum so that you can give them some money in return.
3. Asked you or have given a bribe in order to receive a government service.

4. Asked you or have given a bribe in order to secure a job with Machakos County Government.

.....

Therefore, if any leader including politicians, may it be Machakos Senator Johnstone Muthama, Deputy Governor Bernard Kiala, any of my Ministers, Members of Parliament, all other elected leaders, Chief Officers and senior Government officials, Board members, Directors, Accountants, Engineers etc. have engaged with you in a corrupt manner, please let me know. If anyone has used my name or alleged that I have sent them to make deals, please also let me know because at no time have sent them to make deals, please also let me know because at no time have I sent anyone or engaged in deal making using County money.”

3. Following the said advertisement, the Applicant Hon. Senator Johnstone Muthama moved this Court through the chamber summons application dated 10th February, 2015 and prayed for orders that:

“1. THAT for reasons to be recorded this matter be certified as urgent and service of the same be dispensed with in the first instance;

2. THAT this Honourable Court do grant leave to the herein Applicant to commence Judicial Review proceedings against the herein Respondents seeking an Order of Prohibition against the 1st and 2nd Respondents from taking any action on any information received by the 1st Respondent pursuant to the Special Announcement by Machakos County Governor Dr. Alfred N Mutua published in the Star newspaper of 22nd January, 2015;

3. THAT the grant of leave to commence the Judicial Review proceedings do act as a stay of any action on any information received by the 1st Respondent pursuant to the special Announcement by Machakos county governor Dr. Alfred N. Mutua published in the star of 22nd January 2015;

4. THAT costs be provided for.”

4. The Applicant named the Government of the County of Machakos as the 2nd Respondent, the Attorney General as the 3rd Respondent and the Ethics and Anti-Corruption Commission as an Interested Party.

5. On 20th February, 2015, with the consent of Dr. Khaminwa for the Applicant, the 3rd Respondent and the Interested Party were discharged from these proceedings.

6. The 1st and 2nd respondents opposed the application through grounds of opposition dated 28th April, 2015 and a replying affidavit sworn by the 1st Respondent on 23rd June, 2015.

7. A perusal of the grounds in support of the chamber summons application for leave and the supporting affidavit sworn by the Applicant on 10th January, 2015 discloses that the Applicant seeks leave to commence judicial review proceedings on the grounds that the advert is defamatory; that the 1st and 2nd respondents had no powers to cause the advert to be published; that the 1st and 2nd respondents’ actions amount to usurpation of the powers of the Ethics and Anti-Corruption Commission (EACC) to investigate corruption; that the advert has violated the Applicant’s rights and freedoms; that the 1st and 2nd respondents exceeded their jurisdiction; and that the advert is mischievous.

8. The Applicant disclosed that he had since sued the 1st Respondent for libel in Nairobi High Court Civil Suit No. 49 of 2015, Hon. Senator Johnstone Muthama v Dr. Alfred N. Mutua.

9. In opposing the grant of leave to commence judicial review proceedings, the 1st and 2nd respondents asserted that the application is a non-starter, speculative, vexatious and premature.

10. It is their case that these proceedings amount to duplicity of suits as the Applicant has already filed a defamation suit involving the parties herein and raising the same issues.

11. In addition, they contend that there is no decision or order made in the advertisement that is capable of attracting orders of certiorari and prohibition.

12. The question for the determination of this court is whether the Applicant has met the threshold for the grant of leave to commence judicial review proceedings. Rule 1(1) of Order 53 of the Civil Procedure Rules, 2010 makes it mandatory for leave to be granted before judicial review proceedings can be commenced.

13. The reason for requiring leave is to ensure that only arguable cases are allowed to proceed to hearing.

14. In **Aga Khan Education Service v Republic ex parte Seif [2004] eKLR** the Court of Appeal observed that:

“We think both Mr. Inamdar and Mr. Kigano are generally agreed on the principles of law applicable in these matters. They are agreed that in order to enable a judge to grant leave under Order 53, there must be prima facie evidence of an arguable case and for that proposition both counsel rely on this Court’s decision in: IN THE MATTER OF AN APPLICATION BY SAMUEL MUCHIRI WANJUGUNA & 6 OTHERS and IN THE MATTER OF THE MINISTER FOR AGRICULTURE AND THE TEA ACT, Civil Appeal No. 144 of 2000 in which the Court approved and applied the principles to be found in the English case of R v SECRETARY OF STATE, ex p. HERBAGE [1978] 1 ALL ER 324 where it was stated thus:

“It cannot be denied that leave should be granted, if on the material available, the court considers without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the court, to the judge who granted leave to set aside such leave – see Halsbury’s Laws of England, 4th Edition Vol 1 (1) paragraph 167 at page 1276.”

So once there is an arguable case, leave is to be granted and the court, at that stage, is not called upon to go into the matter in depth.”

15. Odunga, J in the case of **Lady Justice Joyce N Khaminwa v Judicial Service Commission & another [2014] eKLR** explained the reasons behind the requirement that leave be granted before proceedings commence.

16. The Court of Appeal did set the standard of an arguable case in **Kariuki v Attorney General [1992] KLR 8** at page 15 by quoting Lord Scarman in the case of **Inland Revenue Commissioners v National Federation of Self – Employed and Small Business Ltd [1981] AII ER 93** where he stated that:

“It is wrong in law, as I understand the case, 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, 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 by busybodies, cranks and other mischief makers. I do not see any other purpose served by the requirements for leave.”

17. It is therefore apparent that the threshold for the grant of leave is a low one. An applicant only needs to show that his interests have been affected or threatened by the actions of a public body.

18. In the case before me, the Applicant seeks leave to apply for an order of prohibition against the 1st and 2nd respondents from taking any action on any information received by the 1st Respondent pursuant to his advert in the Star newspaper.

19. The prayer is premised on the presumption that the 1st Respondent will receive information on alleged corruption by the Applicant. It is also premised on the presumption that upon receiving the information, the 1st Respondent has powers which he can exercise to the prejudice of the Applicant. In my view this application is speculative in nature. It is based on scenarios which may never come to pass. I would therefore agree with the 1st and 2nd respondents' argument that this application is premature.

20. The fact that the Applicant has already sought a private remedy through institution of a defamation suit is no bar to commencement of judicial review proceedings. The same cause of action can give rise both to private law and public law remedies and an applicant should not be barred from pursuing all remedies available to him.

21. However, in view of what I have stated about the speculative nature of the Applicant's case, I find that he has failed to surmount the very low threshold of establishing an arguable/prima facie case. His application for leave is therefore dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 24th day of May, 2016

W. KORIR,

JUDGE OF THE HIGH COURT