



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTION AND JUDICIAL REVIEW DIVISION
MISC. APPLICATION NO. 304 OF 2016

**IN THE MATTER OF AN APPLICATION BY RAMESHCHANDRA GOVIND GORASIA FOR
LEAVE TO APPLY FOR ORDER OF PROHIBITION**

AND

**IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT MILIMANI LAW COURTS
IN CRIMINAL CASE NO. 1043 OF 2016**

AND

IN THE MATTER OF THE PENAL CODE & CRIMINAL PROCEDURE CODE

AND

**IN THE MATTER OF ARTICLES 29 (A), 39, 48 & 50 OF THE CONSTITUTION OF KENYA,
2010**

REPUBLIC.....APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

THE DIRECTOR GENERAL, DIRECTORATE OF

CRIMINAL INVESTIGATION.....2ND RESPONDENT

EX PARTE: RAMESHCHANDRA GOVIND GORASIA

RULING

Introduction

1. By a Chamber Summons dated 15th July, 2015, the applicant herein, **Taj Mall Limited**, seeks the following orders:

1. **That leave be granted to institute judicial review proceedings seeking;-**

- a. **An order of Prohibition prohibiting the respondents from prosecuting and from proceeding any further or taking any further steps in any whatsoever with the Criminal in Case No. 1043 of 2016 filed at the Chief Magistrate's court, Milimani Law Courts, Nairobi.**
 - b. **That the costs of this application be provided for.**
2. **That the grant of leave herein do operate as a stay of the Criminal proceedings pending at the Chief Magistrate's Court, Milimani Law Courts being Criminal Case No. 1043 of 2016 pending the hearing and determination of the judicial review application.**

Applicant's Case

2. According to the applicant, **Rameshchandra Govind Gorasia**, he is the Managing Director of Taj Mall Limited, a limited liability company duly registered under the Companies Act and which company is the registered proprietor of that property known as LR No. 20273 situated in Embakasi within Nairobi County.
3. According to him the said property is owned by Taj Mall Limited by virtue of a Grant No. I.R 63978 issued by the Commissioner of Lands on 9th April 1996. However, unknown to the Applicant, a company known as **Siesta Investment Limited** had fraudulently procured a title to the same parcel of land and was issued with a title No. I.R 141915. Instead of investigating how the lands office issued two (2) titles for the same parcel of land, the applicant contended that L.F.I.U C.I.D. HQ, which the applicant has not in any part of the documents filed explained what it stands for, decided to charge the applicant with four criminal counts without attempting to investigate the officials at the lands office to confirm whether the two titles originated from the lands office. It was further contended that the said L.F..I.U. C.I.D. have not bothered to take any title documents for forensic analysis and no report has been presented by them to prove whether the titles are either genuine or forgeries.
4. It was the applicant's case that Taj Mall Limited through the Applicant's lawyer duly followed all the relevant procedures in law for transfer of the property into the name of the said company hence the transfer process was transparent and above board and followed all the relevant procedures in law. To the applicant, Taj Mall Limited is an innocent purchaser for valuable consideration hence the criminal proceedings against the applicant are made in bad faith and are full of malice.
5. It was therefore contended that the conduct of the respondents are in breach of their statutory duties.

Determination

6. I have considered the issues raised in this application.
7. The requirement for leave was explained by a three judge bench comprising **Bosire, Mbogholi-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321**, Nyamu, J (as he then was) held 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 and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See also **Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353**.
8. **Waki, J** (as he then was), on the other hand, in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** put it thus:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an

early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”.

9. This position was confirmed by the Court of Appeal in Meixner & Another vs. Attorney General [2005] 2 KLR 189 in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.
10. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated in Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8 as follows:

“If he [the Applicant] fails to show, when he applies for leave, a *prima facie* case, 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 of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers...”

11. In Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK), the Court stated:

“Application for leave to apply for orders of judicial review are normally *ex parte* and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court's discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved.”

12. This position was appreciated by Majanja, J in *Judicial Review Misc. Civil Appl. No. 139 of 2014 between Vania Investments Pool Limited and Capital Markets Authority & Others* in which the learned Judge expressed himself as follows:

“I do not read the Court of Appeal to be saying that the Court should not have regard the facts of the case or have at best a cursory glance at the arguments. As I stated in *Oceanfreight Transport Company Ltd vs. Purity Gathoni and Another Nairobi HC Misc. Appl JR No. 249 of 2011 [2014] eKLR*, “In my view, the reference to an “arguable case” in *W’Njuguna’s Case* is not that the issue is arguable merely because one party asserts one position and the other takes a contrary view.” The duty of the court to consider the facts is not lessened by the mere

conclusion that the case is frivolous, or that leave is underserved by examining the facts...Indeed, if leave was to be considered a matter of right then the purpose for which leave is required would be rendered otiose.”

13. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a *prima facie* arguable case for grant of leave.
14. Whereas he is not required at that stage to go into the depth of the application, the applicant must disclose the existence of *prima facie* grounds for the grant of judicial review reliefs. Such grounds must *prima facie* be based on the facts as averred by the applicant in the verifying affidavit. It is therefore not enough to simply throw the grounds for the grant of judicial review and contend that a *prima facie* case has been made out. A *prima facie* case, in my view is made out when the applicant's case if true may justify the grant of the orders of judicial review. Where the facts disclosed, even if true cannot possibly justify the grant of judicial review remedies, a *prima facie* case, for the purposes of judicial review cannot be said to have been made out.
15. In this case, the applicant's case seems to be based on the fact that it was an innocent purchaser of the suit land without notice and that though the suit land seems to have double registration, the so called L.F.I.U C.I.D. HQ instead of investigating how the lands office issued two (2) titles for the same parcel of land decided to charge the applicant with four criminal counts before ascertaining whether the titles are either genuine or forgeries.
16. In my view the applicant's case seems to be what constitutes his defence to the criminal charges and the mere fact that a person believes he has a good defence to the criminal case is not a ground for commencing judicial review proceedings.
17. Apart from that whereas the applicant has exhibited several documents to the application, the most crucial document, the charge sheet, has for reasons unknown to the Court been omitted. In the premises based on the material placed before me I am unable to find that the applicant has established a *prima facie* case for the purposes of leave to commence judicial review proceedings.
18. Accordingly the Chamber Summons dated 15th July, 2016 fails and is dismissed with no order as to costs.

Dated at Nairobi this 20th day of July, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mungai for the ex parte applicant

Cc Mwangi