REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

JUDICIAL REVIEW APPLICATION NO.148 OF 2015

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

IN THE MATTER OF THE WILDLIFE (CONSERVATION AND MANAGEMENT) ACT CAP 376 LAWS OF KENYA

AND

IN THE MATTER OF PROCEEDINGS BEFORE THE CHIEF MAGISTRATE'S COURT AT MAKINDU CRIMINAL CASE NO

1299 OF 2013

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF MAGISTRATE MAKINDU.....1ST RESPONDENT

THE DIRECTOR, PUBLIC PROSECUTION.....2ND RESPONDENT

AND

THE KENYA WILDLIFE SERVICE.....INTERESTED PARTY

AND

BERNARD MASAU MAILU .....1ST EXPARTE APPLICANT

JOSHUA KIOKO PETER ..... 2ND EXPARTE APPLICANT

JUDGMENT

The Application

The Applicants herein were granted leave to commence judicial review proceedings in Machakos High Court Miscellaneous Case No 132 of 2015. They subsequently filed their substantive application for judicial review orders herein on 8th July 2015 by way of a Notice of Motion dated 7th July 2015, in which they are seeking the following orders:

1. An order of certiorari to remove into this Court and quash the proceedings and /or decision of the Chief Magistrate, Makindu in **Criminal Case No. 1299 of 2013 – Republic vs Bernard Musau Mailu & Another**.

2. An order of prohibition do issue to prohibit the Respondents jointly and severally from acting pursuant to or in furtherance of the proceedings in **Criminal Case No. 1299 of 2013 – Republic vs Bernard Musau Mailu & Another**, or in any other manner whatsoever.

The grounds for the said application are that the Applicants are charged with three counts involving dealing in and being in possession of illegal trophies under the Wildlife (Conservation and Management) Act, and one count of resisting arrest under the Penal Code in the criminal case in Makindu Law Courts. It is averred that the trial magistrate in the said case has shown open bias and hostility to the Applicants, and has been seen in the company of the complainants.

Further, that the trial Magistrate has threatened and scared off defence witnesses by charging the 1st defence witness with an offence of neglect to report a felony contrary to section 392 of the Penal Code, arising from her evidence in support of the Applicants in the said criminal case. That consequently the defence case was closed pre-maturely and the Applicants have not been accorded a fair hearing.

The Applicants' case is detailed in a statement of facts dated 19th June 2015, and a verifying affidavit sworn by the 1st Applicant on 22nd June 2015. The Applicant's learned counsel, Francis Etole also filed written submissions in Court on 16th June 2016 wherein he relied on the above stated averments to argue that the Applicants' right to access to justice under Article 48 of the Constitution, and their right to fair trial under Article 50 of the Constitution were infringed and violated. Reliance in this respect was placed in the decisions in **Peter M. Kariuki vs AG, (2014) e KLR** and **Republic vs Board of Governors, Our Lady of Victory Girls School Kapnyeberai & Another ex parte Korir Kipyego Joseph & Another, (2015) e KLR .**

The Response

The 1st Respondent's Litigation Counsel, Odhiambo A. Leah, filed Grounds of Opposition to the application dated 24th September 2015. It was averred therein that the prayers sought ought to be dismissed as the 1st Respondent had requisite jurisdiction to determine the matter at hand, and the Applicants has not demonstrated any case as to why an order of certiorari should be issued against it . Further, that the matter is not within the purview of judicial review, neither does it meet the basics tenets of a judicial review application which should deal with procedure of decision making and not the merit or substance.

The 2nd Respondent opposed the Application by way of a replying affidavit sworn by its Prosecution Counsel, Shijenje Johnson, on 6th August 2015. He stated therein that the Applicant's application is made in bad faith and in abuse of the due process, and that the net effect of granting the prayers sought will be to cripple the Respondents from discharging their core mandate to the undue advantage of the Applicants. Further, that the Applicants ought to have sought the recusal of the trial magistrate if at all they felt the Court was biased, and it is equally still open for the Applicants to await the decision of the trial Court and challenge the same, including the proceedings by way of an Appeal.

According to the 2nd Respondent, it is within the powers of a Judicial Officer to order for the arrest and recommend prosecution of any person who is reasonably believed to have committed an offence, and that the trial Court in the instant case properly ordered for the arrest of one of the defense witnesses, Mary Mwikali Musau ,who in any event pleaded guilty in Makindu Principal Magistrate Criminal Case No. 560 of 2015, for failing to prevent a felony.

In addition, that it has not been demonstrated by the Applicants that the Respondents herein failed to adhere to the laid down procedures in the conduct of Makindu law Courts Criminal Case No. 1299 of 2013, or that they sought the trial Court's help to procure the attendance of the alleged witnesses. Further,

that the alleged social places and particulars thereof where the trial Magistrate was seen in the company of the complainants have not been stated.

The Respondents did not file any submissions, and the 2nd Respondent's learned counsel, Shijenje Johnson, submitted during the hearing of the application that they would wholly rely on the pleadings they had filed.

The Issues and Determination

I have considered the pleadings and submissions by the Applicants and Respondents. The scope of the judicial review remedies of *certiorari*, *mandamus* and prohibition 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:

> **"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 natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings….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. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter."**

The issue therefore that requires determination is whether any grounds have been established by the Applicants for the orders sought of certiorari and prohibition to issue against the Respondents.

The nature and scope of the remedy of certiorari as further stated 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 on1y 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."**

The first question therefore to be answered is what is the decision that is sought to be quashed. This is in light of the nature of the order of certiorari that is only issued when a public body has rendered a decision on a matter or taken action on the matter. No evidence was brought in this regard by the Applicants of any proceedings or orders made by the Respondent against them that they seek to quash.

The only evidence attached by the Applicants were the proceedings in **Makindu Principal Magistrate's Criminal Case No 560 of 2015 –R vs Mary Mwikali Musau,** where the accused pleaded guilty and was fined Kshs 10,000/- or 6 months imprisonment in default. It is not clear from the said proceedings what the charges brought against the said accused person were, what the alleged wrongdoing was or how the said decision affects the Applicants.

In the absence of any evidence of the decision or proceedings of the Respondents sought to be quashed, or

the manner in which any decisions made by the Respondents were arrived at, this Court is not able to establish the alleged bias and hostility on the part of the Respondents in their decision making process, and the order sought of certiorari cannot therefore issue.

Likewise, in the absence of evidence of the proceedings or other actions undertaken by the Respondents, this Court will be hard pressed to find out if the Respondents have acted in excess of jurisdiction, and whether they should therefore be prohibited from undertaking any further actions. This finding again has been informed by the nature of the order of prohibition, which only looks to the future, and is meant to stop an anticipated event.

Lastly, it is a settled position that Courts ought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution, or interfere with the jurisdiction of the Courts to hear and determine cases, unless there is clear evidence that the said bodies have acted in abuse of process. No such evidence has been provided in the present application.

In the premises, the Applicants' Notice of Motion dated 7th July 2015 is found not to have merit, and is accordingly dismissed with no order as to costs. The orders of stay and lifting of warrants of arrest granted herein on 1st February 2016 are accordingly vacated.

Orders accordingly**.**

DATED AND SIGNED AT MACHAKOS THIS 22nd DAY OF NOVEMBER 2016

P. NYAMWEYA

JUDGE