



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO. 371 OF 2015

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW
PROCEEDINGS**

AND

IN THE MATTER OF AN ORDER FOR PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF ARTICLES 23 & 47 OF THE CONSTITUTION OF KENYA

BETWEEN

HILDAH NYARUA THUKU.....APPLICANT

AND

THE CHIEF MAGISTRATE, NAIROBI.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

THE DCIO LANGATA POLICE.....4TH RESPONDENT

RULING

Introduction

1. By a Chamber Summons dated 24th October, 2015, the applicant herein, **Hildah Nyaruai Thuku**, seeks the following orders:

1. That this honourable court be pleased to certify this matter as urgent and service be dispensed with in the first instance.

2. That this honourable court be pleased to grant the Applicant leave to institute judicial review proceedings against the intended Respondents by way of orders of prohibition and certiorari.

3. That leave once granted do operate as stay of the Respondents' decision to summon,

arrest, prosecute and charge the Applicant or impound and/or detain the Applicant motor vehicle registration number KBR 985H Honda CRV pending the hearing and determination of this application

4. That costs of this application be provided for.

Applicant's Case

2. According to the applicant, she entered into an agreement for the purchase of motor vehicle reg. no. KBR 985H from the 2nd interested party herein on the belief that the said interested party had the capacity to and authority to dispose of the same and vest the interest therein in the applicant.
3. Upon payment of the purchase price the applicant was issued with a log book in her name and obtained possession thereof as an innocent purchaser without value. However the 1st interested party apparently lodged a complaint against the applicant and the 2nd interested party on the ground that the sale of the said vehicle was fraudulent. Pursuant to the said complaint, police sought warrants of arrest against the applicant and the 2nd interested party and for an order for detention of the said vehicle which orders they obtained vide an order given on 19th October, 2015 in Misc. Appl. No. 553 of 2015 before Nairobi CM Cr. Court.
4. According to the applicant the matter herein is civil in nature and the commencement of criminal proceedings is an abuse of the criminal process and is meant to embarrass her. It was further contended that the said action is illegal, irrational and tainted with procedural impropriety and malice.

Determinations

5. I have considered the instant application, the Statement and verifying affidavit filed herein as well as the submissions of counsel.
6. The requirement for leave was explained by a three judge bench comprising **Bosire, Mboghli-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**.
7. **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”.

8. 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.
9. 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...”

10. 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 and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him.... Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of John vs. Rees [1970] Ch 345 at 402. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration.”

11. 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.”

12. 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. Whereas he is not required at that stage to go into the depth of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile. This duty is not satisfied by merely throwing at the Court the grounds upon which judicial review orders are granted but by showing on a prima facie basis that there exist facts which support the said grounds.

13. In this case, it is clear that the impugned warrants were sought and obtained for the purposes of conducting investigations. In **Republic vs. Chief Magistrate Milimani & another Ex-parte Tusker Mattresses Ltd & 3 others [2013] eKLR** this Court expressed itself as follows:

“The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission of a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well civil liability. The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so... The warrants were issued to enable the allegations be investigated. Whether or not the investigations will unearth material which will be a basis upon which a decision will be made to commence prosecution of the ex parte applicants or any of them is a matter which is premature at this stage to dwell on.”

14. It is not contended that the Respondents have made a determination to charge the applicants. This matter, even based on the applicants’ own evidence is still at the investigatory stage. Even at that stage the applicants are entitled under Article 49 of the Constitution to be released on bond pending being charged in Court if such a decision is made. However, at this stage it is premature for this Court to determine what action, if any, the police will take upon conducting the investigations which they are bound to do. As was held in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.

15. In this case the applicant has not satisfied me that there exist facts which support grounds for the grant of leave. In the premises I decline to exercise my discretion in favour of the applicants as sought herein.

16. It follows that without leave being granted these proceedings are rendered still-born and are hereby struck out but with no order as to costs.

Dated at Nairobi this 28th day of October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Karanja for the Applicant

Cc Patricia