REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

HIGH COURT MISCELLANEOUS J.RNO. 240"B" OF 2011.

FARAH TEJANI, ALIAS FARAH AZIM HUSEIN RAJANI.....1st APPLICANT

QAMAR BARKAT TEJANI SULTANA.....2ND APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

JUDEGMENT

The proceedings in Nairobi H.C. Misc Criminal Application No. 515 of 2010 were commenced through a notice of motion dated 20th September, 2010 and filed in court on 21st September, 2010. The application which is said to be brought "**under the inherent and unlimited original criminal jurisdiction of the High Court and under Article 165 (3) (a) and Article 165(6) and (7) of the Constitution of Kenya and under Section 123(3), Section 125(1) and (2) of the Criminal Procedure Code, Cap 75 Laws of Kenya and all other enabling provisions of the law"** seeks orders as follows:-

1. THAT this application be certified urgent and fit to be heard inter-partes on priority basis.

2. THAT this Honoruable court be pleased to refer and/or direct that this matter be heard by the Honourable Lady Justice Khaminwa for purposes of interpreting and/or clarifying the terms of the prohibition Order made by the Learned Judge on 19th July, 2010 in Nairobi High Court Miscellaneous Application No. 136 of 2010 (REPUBLIC VS. CHIEF MAGISTRATE'S COURT AT NAIROBI & AFRICAN BANKING CORPORATION BANK LIMITED, EX-PARTE FARAH TEJANI & QAMAR SULTANA BARKATI TEJANI).

3. THAT pursuant to the Prohibition Order made by the Honourable Lady Justice Khaminwa on 19th July, 2010 in Nairobi High Court Miscellaneous application No. 136 of 2010, this Honourable Court be pleased to discharge the Applicants from all criminal charges filed by the prosecution in Nairobi Chief Magistrate's Criminal case No. 29 of 2010 (REPUBLIC VS FARAH TEJANI, ALIAS FARAH AZIM HUSEIN RAJANI & QAMAR BARKET TEJANI SULTANA) and to permanently terminate the said case.

4. THAT pursuant to the Prohibition Order made by the Honourable lady Justice Khaminwa on 19th July, 2010 in Nairobi High Court Miscellaneous Application No. 136 of 2010, this Honourable

Court be pleased to order that the applicants herein be refunded the Cash bail of Kshs.300,000/= deposited by each of them in Nairobi Chief Magistrate's Criminal Case No. 29 of 2010 (REPUBLIC VS. FARAH TEJANI, ALIAS FARAH AZIM HUSEIN RAJANI & QAMAR BARKAT TEJANI SULTANA)

5. THAT in the alternative to prayer 4 hereinabove, this Honourable Court be pleased to Order the Chief Magistrate's Court at Nairobi and/or the Magistrate's Court seized of Nairobi Chief Magistrate's Criminal Case No. 29 of 2010 to forthwith release and/or direct to be released to the Applicants herein, the Cash bail sum of Kshs.300,000/= deposited by each of them on 8th of January ,2010 under Nairobi Chief Magistrate's Criminal Case No. 29 of 2010 (REPUBLIC VS. FARAH TEJANI, ALIAS FARAH AZIM HUSEIN RAJANI & QAMAR BARKAT TEJANI SULTANA)

6. THAT this Honourable Court be pleased to call for the record of the proceedings in Nairobi Chief Magistrate's Criminal Case No. 29 of 2010 (REPUBLIC VS. FARAH TEJANI, ALIAS FARAH AZIM HUSEIN RAJANI & QAMAR BARKAT TEJANI SULTANA) and give directions for the discharge of the accused persons and release of their cash bail in fulfillment of Prohibition Order made by the Honourable Lady Justice Khaminwa on 19th July, 2010 in Nairobi High court Miscellaneous application No. 136 of 2010.

7. THAT this Honourable Court be please to make such other orders as it may deem just and expedient in the interests of fairness and natural justice.

The said application is supported by grounds on its face and the supporting affidavit sworn by Timothy Naeku on 20th September, 2010 plus the annextures thereto.

On 14th October, 2010 the respondent filed the following grounds of objection:-

1. The application is incompetent, bad in law, frivolous, vexations and an open abuse of the court process.
2. The application is brought in bad faith, is misconceived, improperly before court and unmeritorious
3. The application has not met the requisite requirements for the grant of the orders sought.

As can be noted from the title of the case, the same was filed in the Criminal Division. On 12th October, 2010 the matter was by consent of the parties transferred to the Judicial Review Division and later given the number J.R. Misc. Application No. 240 "B" of 2011.

I will therefore look at this matter from the lenses of judicial review.

At page 8 paragraph 3 of the submissions dated 26th January, 2011 filed by the applicants' advocate it is stated that:-

"Regardless of the procedure adopted by the Applicants this Honourable court has the jurisdiction and duty to interpret its own order and this court is well vested to hear and determine this application and to grant the orders sought."

It is noted that the submissions were filed before this matter was transferred to the Judicial Review Division. Another argument put forward by the applicants was that "justice shall be administered without undue regard to procedural technicalities" as provided by Article 159 (2) (d) of the Constitution.

Judicial review proceedings are commenced under the Law Reform Act and Order 53 of the Civil procedure Rules 2010. Rule 1(1) of Order 53 provides that:-

"No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule".

The applicants did not seek leave to commence the proceedings herein. When the matter was transferred to the Judicial Review Division they did not apply to be allowed to make their case conform with judicial review rules.

The importance of obtaining leave even if the matter was transferred from another division was captured by Harry Woolf, Jeffrey Jowell and Andrew le Sueur in paragraph 16-041 at Page 838 of the 6th Edition of their book, **De Smith's Judicial Review** when they stated that:-

"Permission must be sought even if a claim is transferred to the Administrative Court having been commenced elsewhere. Permission must also be sought subsequently if a claimant seeks to rely on grounds other than those for which he had been given permission to proceed."

Without leave being granted, judicial review proceedings cannot commence. For this failure alone the applicants' application should fail. There are other procedures that the applicants did not comply with as can be seen below.

Any judicial review application must be made within Order 53 or under the inherent jurisdiction of the court. In this case the applicants' prayers are said to be brought under the Criminal Procedure Code.

Judicial review remedies are limited and the well known ones are orders of mandamus, prohibition and certiorari. The applicants did not pray for such orders in their application.

The format for instituting judicial review proceedings was not followed. Judicial review proceedings are instituted in the name of the crown (the Republic). This has not been done by the applicants. Whatever I have stated above was clearly captured by Ringera J (as he then was) in the case of **WELAMONDI VS. THE CHAIRMAN, ELECTORAL COMMISSION OF KENYA , (2002) KLR, 406.**

For all the shortcomings, I find that the applicants' application is defective and it cannot be allowed to stand. Although the Constitution demands that justice be administered without undue regard to procedural technicalities, I do not believe that the constitution abolished all the procedures in the statutes. I believe that the Constitution was meant to avoid injustices resulting from failure to comply with minor procedural technicalities. It does not overhaul the Civil Procedure Rules. The defects in the case of the applicants before me are substantive and they go to the root of their application. As such I dismiss their

application. Considering the nature of this application, I make no orders as to costs.

Dated and signed at Nairobi this 16th day of February , 2012 .

W. K. KORIR
JUDGE